CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 432

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

DAN E. MAHER, DOING BUSINESS AS INTERSTATE BUSSES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

FILED OCTOBER 20, 1928

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[Citation in usual form showing service on Wm. L. Harrison, filed Sept. 7, 1938, omitted in printing.]

In United States District Court for the District of Oregon

No. E-9722

DAN E. MAHER, DBA INTERSTATE BUSSES, PLAINTIFF

vs.

HE UNITED STATES OF AMERICA, AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Bill of complaint for injunction

Filed Dec. 15, 1937

Your petitioner files his petition against the Uinted States of merica, and the Interstate Commerce Commission to annul, set aside d enjoin an order, hereinafter set forth, of the Interstate Commerce ommission, hereinafter called the "Commerce Commission," a comission existing under and by virtue of the Interstate Commerce Act, d thereupon your petitioner complains:

I

Jurisdiction of this Court is invoked under the provisions of Title , U. S. C. A. Section 41 (28) and Sections 43-48 inclusive, of said ct.

II

Your petitioner is a common carrier by motor vehicle, engaged in terstate operations over U. S. Highway #99, between Portland, regon and Seattle, Washington, and through various intermediate oints, transporting passengers for the general public for compensaon from each of the aforesaid cities to the other, and from various oints within each of the states of Washington and Oregon, to points ithin other of said states, and in this respect petitioner alleges that was in bona fide operation as a common carrier by motor vehicle tween said cities on June 1, 1935, and that by reason of such operaon this petitioner is, and was at all times herein mentioned entitled a matter of right and law, under the provision of Section 206a of e Motor Carrier Act of 1935, known as the "Grandfather" clause ereof, to have issued to him by the defendant Commerce Commison, a certificate of public convenience and necessity, authorizing ch operation, and that pending the issuance of said certificate, petiner is of right, and as provided in said certificate, entitled to ntinue his service.

5

III

Petitioner, by application filed on or about the 1st day of January 1936, with said defendant Commerce Commission, sought a certificate of public convenience and necessity, authorizing petitioner to operate as a common carrier by motor vehicle of passengers and their baggage over U. S. Highway #99, between Portland, Oregon, and Seattle, Washington, and intermediate points thereof.

IV

That thereafter the defendant Commerce Commission assigned said petition for hearing before Joint Board #45, and a hearing was had before said Joint Board #45 on the 12th day of November 1936; that thereafter, and on the 10th day of March 1937, the said Joint Board #45 returned to the defendant Commerce commission, its Report and Recommended Order to which, within 25 days from the date of service thereof, the said petitioner served and filed his exceptions to said Report and Recommended Order; that thereafter, and on the 27th day of October 1937, the defendant Commerce Commission ordered that the application of said petitioner for a certificate of public convenience and necessity be denied and made said order effective December 10, 1937, and further ordered that said petitioner cease and desist on or before the 10th day of December 1937 from operations as a common carrier by motor vehicle of passengers and their baggage in interstate commerce from Portland, Oregon, to Seattle, Washington; that thereafter, and on the 27th day of November 1937, said petitioner filed with the defendant Commerce Commission his petition for a rehearing and reconsideration; that on the 6th day of December 1937, the defendant Commerce Commission made and entered its order denying rehearing and reconsideration of the matters therein contained, but did make and enter an order extending the time for the petitioner to cease and desist operations as a common carrier, from the 10th day of December 1937 to the 10th day of January 1938.

V

Petitioner alleges that by his application filed with the defendant Commerce Commission, and by evidence deduced at the purported hearing before Joint Board #45, it was shown that petitioner was in bona fide operation as a common carrier by motor vehicles on June 1, 1935, over the routes and within the territory for which application was made, and prior thereto; that there was no evidence before said defendant Commerce Commission to the contrary; that said purported order of the defendant Commerce Commission, requiring petitioner to cease and desist operation on or before the 10th day

6 of January 1938, and is without evidence to support it, and is contrary to the evidence, and in making and entering said pur-

ported order, the Commerce Commission exceeded its statutory powers and acted arbitrarily and unreasonably, and based said purported order on improper distinctions and considerations and interpretations of the Motor Carrier Act of 1935; that by reason of the premises petitioner has been denied due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States, and will suffer great and irreparable injury in that petitioner's business will be wholly lost and destroyed, and petitioner's revenue from passengers who would otherwise travel by petitioner's service will be irreparably lost and petitioner's investment in coaches, busses, offices, and other facilities made wholly unproductive; that petitioner's employees will be deprived of this means of livelihood and the traveling public will be prevented from traveling by petitioner's service, as they would otherwise choose to do. That defendant Commerce Commission by law is not responsible in damages for such loss or injury to petitioner, to petitioner's employees, nor to the public, and such losses are not compensible in damages; that even a temporary cessation of petitioner's service would cause irreparable loss and injury and would be equivalent to a final adjudication in defendant's favor despite the numerous issues of law and facts which can only be determined by a full hearing on the merits.

Wherefore, petitioner prays:

1. Writ of Subpoena ad Respondendum issue immediately out of, and under seal of this Court, and be directed to said defendants, United States of America and Interstate Commerce Commission, requiring and commanding said defendants on day certain therein to be specified to be and appear before this Court and to answer this Bill;

2. That this Court direct that due and proper notice of this Bill and proceedings issue, and be served forthwith, as prescribed in Act of October 22, 1913, C-32; 28 U. S. C. A., Sec. 41 (28) and 43 to 48 inclusive;

3. That a Court, constituted as required by said Act of October 22, 1913, C-32; 28 U. S. C. A., Sec. 47, be convened and that said Court, as constituted and convened, after hearing had upon due and legal notice to defendants, enter its order setting aside and annulling said order of said Interstate Commerce Commission, and each and every part thereof, and forever enjoining any construction thereunder;

4. That petitioner have and recover of said defendants his proper costs of suit;

5. That petitioner have such other, further, and general relief as may be equitable and proper.

Respectfully submitted.

WM. L. HARRISON and EDW. DOXEY;
Attorneys for Petitioner.

[*Duly sworn to by Dan E. Maher; jurat omitted in printing.*]
[File endorsement omitted.]

9 In United States District Court

[Title omitted.]

Answer of Interstate Commerce Commission

Filed Jan. 8, 1938

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's bill of complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs I, III, and IV of the bill of complaint, the Commission admits that the allegations therein contained are
10 true, except that the Commission denies that the statements of said paragraph IV as to the substance and effect of the Commission's report and orders are full, true or correct statements of the contents thereof and respectfully refers the court to said report and orders for information concerning the same.

II

Answering paragraph II of the bill of complaint, the Commission says that it has no knowledge as to whether or not the plaintiff is now a common carrier by motor vehicle as alleged in said paragraph. Further answering said paragraph of the bill of complaint the Commission denies that the plaintiff was engaged in the bona fide operation as a common carrier by motor vehicle between Portland, Oreg., and Seattle, Wash., on June 1, 1935, as alleged in said paragraph; denies that plaintiff has been engaged in such operation since June 1, 1935, within the meaning of Section 206 (a) of the Motor Carrier Act of 1935; denies that plaintiff either is now, or has been in the past, entitled under said section or any other section of said Act to have issued to him by the Commission a certificate of public convenience and necessity either authorizing or entitling the plaintiff to continue the operation described in the application referred to in said paragraph II of the bill of complaint, and further denies that plaintiff is entitled to operate or to continue to operate said service pending the issuance of such certificate.

III

Further answering said bill of complaint, the Commission admits and alleges that it made the order of October 27, 1937,
11 referred to in paragraph IV of the bill of complaint in a proceeding then pending before it wherein was involved the right

of the plaintiff to receive from the Commission a certificate of public convenience and necessity authorizing plaintiff to operate as a common carrier by motor vehicle in interstate commerce as described in paragraphs III and IV of the bill of complaint; that the Commission made a report in said proceeding which was also dated October 27, 1937, and which was referred to and made a part of said order of October 27, 1937; that said order of October 27, 1937, was by its terms made effective December 10, 1937, and that by order dated December 10, 1937, the effective date of said order was changed from December 10, 1937, to January 10, 1938. The Commission refers the court to said report and orders, copies of which are attached to this answer as Exhibit A, for more full and complete information in the premises.

The Commission further alleges that in said proceeding the parties therein, including the plaintiff herein, were, and that each of them was, afforded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in and by said report and orders was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of said plaintiff by the counsel of said parties; that at said hearing and subsequently the questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including all questions presented by the plaintiff in this suit, whereupon the Commission determined said matters and entered and duly served upon said plaintiff
12 and upon all other interested parties, its said report and order of October 27, 1937; that said report and order of October 27, 1937, included the Commission's findings of fact, decisions, conclusions, orders and requirements in the premises, and that, upon the evidence aforesaid, as shown in and by said report, the Commission made the findings and stated the conclusions upon which said report and order of October 27, 1937, are based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said report and orders it considered and weighed carefully in the light of its own knowledge and experience each fact, circumstance and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including the matters covered by the allegations of the bill of complaint herein.

The Commission further alleges that said order of October 27, 1937, was not made or entered either arbitrarily or unjustly or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each

of and all the allegations to the contrary contained in said bill of complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the bill of
13 complaint in so far as they conflict either with the allegations herein or with either the allegations or conclusions of fact contained in said report and order of October 27, 1937, which report and order, as aforesaid, are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain and prove, as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By NELSON THOMAS, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel,

14 [*Duly sworn to by Joseph B. Eastman; jurat omitted in printing.*]

15 *Exhibit A to answer*

Interstate Commerce Commission

No. MC 59620

DAN E. MAHER, COMMON CARRIER APPLICATION

Submitted July 20, 1937. Decided October 27, 1937

Applicant found to have failed to establish the right to a certificate as a common carrier by motor vehicle of passengers and their baggage between Portland, Oreg., and Seattle, Wash., under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935. Certificate denied and operations ordered discontinued.

William L. Harrison for applicant.

Alvin A. Kurtz for Public Utilities Commissioner of Oregon, and Philip Chipman, L. W. Hobbs, Paul P. Farrens, Raymond W. Clifford, and Herbert J. Shaw for protestants.

REPORT OF THE COMMISSION

Division 5, Commissioners EASTMAN, LEE, and ROGERS

By Division 5:

No exceptions were filed to the recommended order of the joint board but it was stayed by our order of April 24, 1937, and the parties were permitted to file supplemental briefs thereafter.

By application filed January 24, 1936, under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935, Dan E.

Maher of Portland, Oreg., seeks a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle of passengers and their baggage between Portland and Seattle, Wash., over U. S. Highway 99. The Public Utilities Commissioner of Oregon, Oregon Bus Association, Motor Coach Association of Washington, North Coast Transportation Company, and certain rail lines appeared in opposition to the application.

In writing prior to the hearing and orally at the hearing applicant moved to strike the protests of the Public Utilities Commissioner of Oregon, Oregon Bus Association, and North Coast Transportation Company. The joint board overruled the motion. On brief applicant renews the motion and asks that we rule thereon. It is contended that these protestants are not real parties in interest and that the protests of the Oregon Bus Association and North Coast Transportation Company are prejudicial in that they were filed by or on behalf of applicant's competitors. In proceedings such as this, any person who has an interest therein may appear and be heard. These protestants filed written protests prior to the hearing, in accordance with our rules, which protests clearly show that protestants
16 have an interest in the proceeding. Obviously, the regulatory body of a State in which an applicant claims to have conducted bona fide motor vehicle operations and other carriers who operate in the same territory have a direct interest in the proceeding. The motion was properly overruled.

At present applicant is engaged in the transportation of passengers between Portland and Seattle over U. S. Highway 99, serving intermediate points. Operations are conducted on a regular daily schedule between fixed termini. Fares are based on a published tariff. A 25-passenger bus, purchased particularly for this service, is regularly used, and applicant also owns a 10-passenger vehicle which is used when needed. Operations as at present carried on were commenced on May 29, 1936, under the trade name Interstate Busses, a trade name not theretofore used. It is contended by applicant that he is entitled to a certificate under the "grandfather" clause of section 206 (a) of the act authorizing him to continue this service by virtue of bona fide operations conducted on, prior to, and after June 1, 1935.

Applicant has been engaged in the transportation of passengers since 1931. Prior to the institution of his present regular operation between Portland and Seattle on May 29, 1936, he conducted an irregular, so-called anywhere-for-hire operation in Oregon with occasional trips to points in Washington. This operation consisted mostly of the transportation of groups of employees from Portland to logging camps in Oregon and Washington. Baseball and basketball teams were also transported. Applicant maintained no terminal facilities. He obtained his business principally through contacts with employment agencies at Portland where men were hired for work at logging camps. While the application alleges that trips were made over the considered route on an average of three times per week,

applicant testified that this was only an estimate and that "Sometimes I went into the State of Washington twice a day with two cars; and sometimes I didn't go into the State of Washington for a month." Operation was conducted in Oregon under an anywhere-for-hire permit issued by the Public Utilities Commission of Oregon. Two vehicles of 10 or 11-passenger capacity were used. Applicant did not publish a tariff but based his charges on the mileage involved on each trip.

Applicant kept detailed records with respect to his operations in Oregon for the purpose of making reports to the authorities of that State. No record, however, was kept of operations in Washington for the reason that no reports were made to the authorities of that State. In instances where trips were made to Washington applicant's records would show the destination point as Vancouver, Wash., or Vancouver Bridge, the point at which the State of Washington was entered. The oral testimony of applicant's witnesses is that trips were made at various times between 1933 and 1936 to Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, Wash. It appears that 11 such trips were made in 1935 and six during 1936 between January and April. The evidence does not disclose, however, what particular distinations were served on the 16 trips just mentioned, but only that trips to points in Washington were made.

17 Although the application alleges that regular-route operations were conducted on U. S. Highway 99 between Portland and Seattle and that all intermediate points were served on June 1, 1935, it is to be noted that many of the points specifically referred to in the evidence are located on other highways. For example, Cathlamet and Deep River are on U. S. Highway 830; Raymond and Aberdeen are on U. S. Highway 101; Neah Bay is in the extreme northwestern corner of the State a considerable distance from any point on U. S. Highway 99 between Portland and Seattle; and Spokane is in the extreme eastern part of the State many miles from U. S. Highway 99. Prior to the institution of his scheduled service between Portland and Seattle, applicant had not made a trip to Seattle since about 1933. There is no evidence of service at any time to most of the intermediate points on the considered route, nor is it shown that passengers were transported on return trips to Portland.

When applicant instituted regular-route service between Portland and Seattle it appears that he discontinued the so-called anywhere-for-hire operations theretofore conducted. It is his desire that we issue him a certificate authorizing continuance of his present regular service between fixed termini. Carriers are entitled, under the "grandfather" clause, to authority to continue the bona fide "operations" in which they were engaged on June 1, 1935, and continuously thereafter. Such certificates may not authorize continuance of operations instituted after that date. The rights of a carrier under this clause must be measured by his actual bona fide operations.

The evidence is convincing that on May 29, 1936, applicant instituted a new and different service from that previously conducted. The operations conducted on June 1, 1935, and prior thereto were in the nature of irregular operations in the transportation of groups of persons from Portland to any point in Oregon or Washington over any route adapted to a particular trip. While U. S. Highway 99 probably was used for at least part of the distance on most if not all of applicant's trips to Washington, the evidence wholly fails to sustain applicant's claim that a regular common-carrier service over that route between Portland and Seattle, with service at all intermediate points, was conducted. It follows that applicant's present operations were instituted and have since been conducted in contravention of the provisions of the act.

We find that applicant has failed to establish that he was in bona fide operation as a common carrier by motor vehicles of passengers and their baggage between Portland, Oreg., and Seattle, Wash., over a regular route, on June 1, 1935, and that he has so operated since that time. An order will be entered denying the application and requiring applicant to cease and desist from any operation in the transportation of passengers and their baggage in interstate or foreign commerce.

LEE, Commissioner, concurring in part:

This applicant has been engaged in the interstate transportation of passengers, as a carrier by motor vehicle, since 1931. Under the "grandfather" clause of the Motor Carrier Act, 1935, he is entitled to continue to operate. I agree with the majority that his regular route operation between Portland and Seattle does not come within the purview of the "grandfather" clause. However, he did continue motor carrier operations begun long before the passage of the act, and it is not right that he should be deprived of his right to operate in interstate commerce as he was doing when the act was passed. By the "grandfather" clause, it was sought to protect carriers in their existing operations. I would issue to him a certificate of convenience and necessity authorizing continuance of the operation he was conducting when the act was passed.

18

19

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 27th day of October, A. D. 1937.

No. MC 59620

DAN E. MAHER COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said division on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered that said application be, and it is hereby, denied, effective December 10, 1937.

And it is further ordered that applicant be, and he is hereby, notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle.

By the Commission, division 5.

[SEAL] W. P. BARTEL, *Secretary.*

20 [Copy]

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 10th day of December, A. D. 1937.

No. MC 59620

DAN E. MAHER COMMON CARRIER APPLICATION

Upon further consideration of the record and of applicant's request for postponement of the effective date of the Division's order of October 27, 1937, in the above-entitled matter, and good cause therefor appearing;

It is ordered that the effective date of the said order of October 27, 1937, be, and it is hereby, postponed to January 10, 1938.

By the Commission, division 5.

[SEAL] W. P. BARTEL, *Secretary.*

[File endorsement omitted.]

22 In United States District Court

[Title omitted.]

Answer of United States of America

Filed Jan. 18, 1938

United States, one of the defendants in the above entitled cause, for answer to the bill of complaint filed herein against it, answers and says:

I

United States admits the truth of the facts alleged in paragraphs I, III, and IV of the bill of complaint, except that it denies that the allegations of said paragraph IV contained full, correct, and complete statements concerning the report and orders of the Interstate Commerce Commission which are therein mentioned, and for full and complete information concerning them the court is respectfully referred to the full text of said report and orders, copies of which are attached hereto and made a part of this answer as Exhibit A.

II

Answering paragraph II of the bill of complaint, United States says that it has no knowledge as to whether the plaintiff is now a common carrier by motor vehicle as alleged in said paragraph and as to that allegation it neither admits nor denies; but United States denies each and every other allegation made and contained in said paragraph II of the bill of complaint.

III

Answering paragraph V of the bill of complaint, United States denies each and every allegation therein and particularly denies that plaintiff will suffer irreparable or any other legal injury if the Commission's said order is not enjoined and annulled; and, further, denies that said order is unlawful or void for any of the reasons alleged in said paragraph V or anywhere in the bill of complaint.

23 Wherefore, having fully answered, United States prays that the relief sought by the bill of complaint be dismissed at the cost of the petitioners, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

ELMER B. COLLINS,
Special Assistant to the Attorney General.

ROBERT H. JACKSON,
Assistant Attorney General.

CARL C. DONAUGH,
United States Attorney, District of Oregon.

ALLAN HART,
Assistant United States Attorney.

[Duly sworn to by Elmer B. Collins; jurat omitted in printing.]

Exhibit A, the same being No. MC 59620, is omitted.

The foregoing answer of U. S. of America served and accepted this 18th day of January 1938.

WILLIAM L. HARRISON, *Atty. for pet.*

[File endorsement omitted.]

25 In United States District Court

[Title omitted.]

Order

February 11, 1938

Now at this day comes Mr. Carl C. Donaugh, United States Attorney and presents to the court Mr. Elmer B. Collins, Special Assistant to the Attorney General to appear in this case as counsel for the defendant The United States, and also presents Mr. Nelson Thomas,

attorney for the Interstate Commerce Commission who is to appear in this case on behalf of the Interstate Commerce Commission. Whereupon, now comes the plaintiff by Mr. William L. Harrison and Mr. Edw. O. Doxey, of counsel, and the defendant The United States of America by Mr. Elmer B. Collins, Special Assistant to the Attorney General, and the defendant The Interstate Commerce Commission, by Mr. Nelson Thomas, of counsel. Whereupon this cause comes on for final hearing before the Honorable Bert E. Haney, United States Circuit Judge for the Ninth Circuit, and the Honorable James Alger Fee and the Honorable Claude McColloch, United States District Judges for the District of Oregon, upon the pleadings and the proofs, and the court having heard the arguments of counsel, will advise thereof. Whereupon, upon motion of the respective parties hereto,

It is ordered that the plaintiff be and is hereby allowed ten days from this date in which to submit his brief herein, and that the defendants be and are hereby allowed ten days thereafter in which to file their answering brief herein.

27 In United States District Court for the District of Oregon

DAN E. MAHER, DOING BUSINESS AS INTERSTATE BUSSES, *Plaintiff*

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Opinion

Filed June 16, 1938

JAMES ALGER FEE, District Judge:

This is a suit brought under Title 28, U. S. C. A. Sec. 41 (28) and Sections 43–48 to set aside an order of the Interstate Commerce Commission made October 27, 1937, in a proceeding designated "MC 59620, Dan E. Maher Common Carrier Application." Maher as a common carrier of passengers and their baggage in interstate commerce over the route of U. S. Highway 99 and within territory contiguous thereto upon June 1, 1935, filed his application on or about January 1, 1936, for a certificate confirming his right under the proviso of Section 206a of the Motor Carriers Act of 1935, 49 U. S. C. A. 306a.[1] The form of the application is not before the Court but it is set up in the complaint and admitted that "petitioner, by application filed on or about the 1st day of January 1936 with said defendant Commerce Commission, sought a certificate of public convenience and necessity, authorizing petitioner to operate as a common carrier by motor vehicle of passengers and their baggage over U. S. Highway #99, between Portland, Oregon, and Seattle, Washington, and intermediate points

[1] All subsequent section references are to the law as codified in United States Code Annotated.

thereof." It is also alleged and admitted that plaintiff "is a
28 common carrier by motor vehicle, engaged in interstate operations over U. S. Highway #99, between Portland, Oregon, and Seattle, Washington, and through various intermediate points, transporting passengers for the general public for compensation from each of the aforesaid cities to the other, and from various points within each of the states of Washington and Oregon, to points within other of said states, and in this respect petitioner alleges that he was in bona fide operation as a common carrier by motor vehicle between said cities on June 1, 1935, and that by reason of such operation this petitioner is, and was at all times herein mentioned entitled as a matter of right and law, under the provisions of Section 206a of the Motor Carrier Act of 1935, known as the 'Grandfather' clause thereof, to have issued to him by the defendant Commerce Commission, a certificate of public convenience and necessity, authorizing such operation." The facts contained in this allegation are admitted by answer.

Upon the filing of said application the matter was referred for hearing to Joint Board No. 45 by the Commission. The Public Utilities Commissioner of Oregon, certain railroads and bus companies were permitted to intervene and oppose the granting of the application. The Commission found that Maher had been, since 1931, conducting a quite irregular transportation of passengers in interstate commerce between Oregon and Washington, continuously to the date of the filing of his application and thereafter until May 29, 1936. The Commission noted that the transportation was authorized under an "anywhere-for-hire" license issued by the Public Service Commission of Oregon and apparently recognized by the authorities of Washington. The bona fides of the operation is established by the facts found. But the Commission held that long after Maher had filed his
29 application for a certificate before it he had begun operation on a regular schedule of a passenger service over the same route and within the same territory and thereafter no longer proceeded with transportation on an irregular schedule as he had done before. It was further found that all Maher's operations in interstate commerce were "probably" over a "route" U. S. Highway 99, whether on the one hand the transportation was "anywhere-for-hire" from Portland, Oregon, to Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, all of which points are in the State of Washington and can best be reached from Portland over U. S. Highway 99 or, on the other hand, on regular schedule between Portland, Oregon, and Seattle, Washington, as fixed termini, since both these points are on U. S. Highway 99. The Commission findings also show that all Maher's operations in interstate commerce were "within a territory," viz, the territory between Portland, Oregon, and Seattle, Washington, and contiguous to U. S. Highway 99.

The Commission concluded that by instituting a regular route with fixed termini the applicant had abandoned his irregular operations.

Based upon this conclusion an order was issued in the following terms:

"Investigation of the matters and things involved in this proceeding having been made, and said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

"It is ordered, That said application be, and it is hereby, denied, effective December 10, 1937.

"And it is further ordered, That applicant be, and he is hereby, notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle."

This court has jurisdiction to enjoin, set aside, annul, or suspend
suit. The cause was tried before a statutory court. No evidence
30 was introduced except a copy of the findings of the Commission which are accepted as the facts.

This court has jurisdiction to enjoin, set aside, annul, or suspend in all or in part any order of the Interstate Commerce Commission, Title 28, U. S. C. A., Section 41, Subdivision 28, but the findings of the Commission are conclusive and can not be assailed "in the absence of the evidence upon which they were made." Mississippi Valley Barge Line Co. vs. United States, 292 U. S. 282. No court, of course, should review a determination which was exclusively within the scope of the power and the discretion of the Commission, or substitute the judgment of the court as to wisdom of the order. Such matters are beyond the province of this tribunal. In this case, the evidence taken before the Commission was not produced, and can not be considered, and this court, therefore, makes no attempt to review the record or establish independent conclusions as to its weight or sufficiency.

But the facts are here set up in the Commission's order and may be considered in the determination of the questions of law. The orders of the Commission are final unless (1) beyond the power which it can constitutionally exercise; (2) beyond its statutory right; or (3) based upon mistake of law. Interstate Commerce Commission vs. Union Pacific Railroad, 222 U. S. 541–547. Thus it may be set aside where the facts are established if "in violation of the constitutional prohibition against taking property without due process of law," or if the Commission acted "so arbitrarily and unjustly as to take action contrary to the facts found by it," or "if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the power." See Interstate Com-
31 merce Commission vs. Union Pacific Railroad, supra. "A conclusion which plainly involves, under the undisputed facts, an error of law" may be set aside. McLean Lumber Co. vs. United States, 237 F. 460.

Upon the facts found by the Commission, it is to be determined whether (1) a certificate should have been issued to Maher, (2) whether a cease and desist order should have been promulgated.

As to the issuance of the certificate, the Commission fell into three errors of law; first, because it refused issuance under the terms of the proviso of the section concluding that he had no "regular" route on June 1, 1935; second, in concluding that a change from an "anywhere-for-hire" to a fixed terminal operation destroyed Maher's right to a certificate notwithstanding all of his transportation was over the same route and within a definite territory; and third, by failing to consider the application under the terms of section 307.

As to the first point, the Commission confused its functions. It confused the diverse terms upon which the two different types of certificates are to be issued. There was an attempt in its conclusions to import the requirement of "regular routes" and "fixed termini" applicable only to certificates under Section 307 into the language of proviso 306 (a) and to make the failure of the applicant to have a "regular route" and "fixed termini" prior to June 1, 1935, a foundation for the absolute denial of the certificate and of the right to operate in interstate commerce at all.

The statute permits two different forms of applications for certificates relating to the transportation of persons or property for hire in interstate commerce. The first is by one who has been in bona fide operation in interstate commerce for a certificate to continue "over the route or routes within the territory for which application is made," under the proviso of Section 306 (a). The other is an application by any qualified person for a certificate of public necessity and convenience to perform a proposed service as common carrier by motor vehicle, under Section 307. Section 308 refers to this differentiation but establishes uniform provisions for both types of certificates. Under Section 306 (a) if the applicant cannot prove operation under the terms of the proviso, the application is to be treated as if it were tendered under Section 307. Confusion between these two diverse forms of application and also between the certificate confirming the rights accrued by an operation conducted in the past and the certificate of public necessity and convenience for future operations appears not only in the briefs but also the findings and conclusions of the Commission.

32

The second type of application is for a certificate by one not previously operating under the conditions prescribed by the act, and relates only to future operations. It is under the terms of the statute not to be issued to common carriers of passengers (1) "over other than a regular route or routes," (2) "and between fixed termini," (3) except for "special or charter operations" and is never to be issued (4) unless the service "is or will be required by the present or future public convenience and necessity." Section 307. The certificate confirming the rights gained by past operations and accepting previous

operation as a substitute for a finding of public necessity and convenience, on the other hand, is to be issued (1) upon a finding of bona fide operation before June 1, 1935, (2) continued since that time, (3) "over a route or routes or within the territory for which application is made." Section 306 (a). Congress did not in this section require a limitation to "regular" route or routes or between "fixed termini" nor make an exception as to charter or special operations. Neither was an actual "public convenience and necessity" requisite since Congress deemed the previous actual operation guaranteed the necessity
33 and convenience of the public.

By the proviso of Section 306 (a), Congress contemplated the continuance of any service by motor vehicle in interstate transportation, whether regular or irregular, seasonal or continuous, actually requisite or not. The purpose is plain. Congress was protecting the property and business of those previously engaged in bona fide transportation of persons and property by motor vehicle in interstate commerce. The proviso of Section 306 (a) set up a scheme for registration of special carriers without destroying their rights or their business. On the other hand, Section 307 provided definite limitations upon the operations of the persons who may in the future desire to obtain the privilege of conducting such operations.

The conclusion of the Commission makes clear the fallacy:

"We find that applicant has failed to establish that he was in bona fide operation as a common carrier by motor vehicle of passengers and their baggage between Portland, Oreg., and Seattle, Wash., over a regular route on June 1, 1935, and that he has so operated since that time."

This conclusion contains a negative pregnant because the facts found are that Maher was in bona fide operation as a common carrier by motor vehicle of passengers and their baggage over "a route," U. S. Highway 99, on June 1, 1935. Nowhere in the findings of fact is it suggested that Maher's operations were not bona fide. It is unquestioned that such operations before May 29, 1936, were not over a "regular" route between Portland, Oregon and Seattle, Washington. This prerequisite to confirmation of existing rights is that the person who made application "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time". 306 (a). Bona fide operation over a route or over a number of routes or within a territory is thus the primary essential. The intention to include all types of operation
34 is made clear by the fact that the applicant was not confined to a route or routes but was to be qualified if he operated within a territory. Further, it is indicated that a certificate was not only to be issued for a regular route but also for irregular routes for "common carrier" is defined in this particular as a person who transports persons and passengers "whether over regular or irregular routes." 303 (a) (14). This phrase was used not to make a dichotomy between these types of service, but to mark clearly the all

acing purpose of Congress. The law further goes to the extent cognizing seasonal service by motor vehicle in interstate com- e. 306 (a). The distinction that the Commission attempted to is made clearer by another finding as follows:

hen applicant instituted regular-route service between Portland Seattle it appears that he discontinued the so-called anywhere- ire operations theretofore conducted"

t both the "anywhere-for-hire" operations which were begun 31 and continued at least until the initiation of the service be- n Portland and Seattle in May 1936, and the operation with l termini" then begun and continuing to date, were "over a ," U. S. Highway 99, between these two points, and "within a tory," viz, that territory reached over U. S. Highway 99 and en Portland and Seattle. Maher made application for this and this territory according to the pleadings.

mmissioner Lee points out:

his applicant has been engaged in the interstate transportation assengers, as a carrier by motor vehicle, since 1931. Under the dfather' clause of the Motor Carrier Act, 1935, he is entitled to nue to operate. * * * By the 'grandfather' clause, it was nt to protect carriers in their existing operations."

the second place, the Commission concluded that because the icant had changed the type of his operation from an "any- where-for-hire" service, using U. S. Highway 99 in interstate commerce, to an operation with the "fixed termini" Portland and Seattle over the same highway, that the operation was continuous one.

is true the act also provides that the operation must have been nued. But the law does not denounce a change of one type rvice to another. Apt words could have been used if this were ntention. Undoubtedly, the applicant would be confined to the service which he was furnishing on June 1, 1935. However, e who had been operating a line in May and June of each year to June 1, 1935, had thereafter extended his service upon a around basis, it could not be argued that he abandoned the nal service. Similarly, if he had thereafter operated for eleven hs and in every month except May, he might have abandoned nonth of May and might even be confined to transportation in alone, but he could not entirely be denied a certificate. So r might well be confined to an "anywhere-for-hire" service upon Highway 99 and compelled to cease his "fixed termini" operation, e was still operating in interstate commerce over a route and in a territory and could not, therefore, be denied a certificate. establishment of a "fixed termini" operation could be deemed an donment of a claim for an "anywhere-for-hire" service in the territory since the act provides:

common carrier by motor vehicle transporting passengers under rtificate issued under this chapter may transport in interstate

or foreign commerce to any place, special or chartered parties under such rules and regulations as the Commission shall have prescribed." Sec. 208 (c).

Upon the facts, a distinction between a regular and an irregular route vanishes. The Commission found that all Maher's operations in interstate commerce were probably in part over U. S. Highway 99. This highway, then, is established for part of the distance, at least, as a regular route. It will be noticed that a regular schedule is
36 not mentioned in the definition. If it be held that Maher is no longer entitled to operate over other routes than U. S. Highway 99, he certainly never abandoned his right to serve the public upon that road. If, on June 1, 1935, he was performing an "anywhere-for-hire" service, it is inconceivable that he forfeited that right by placing his busses on schedule between "fixed termini" on that road so that those persons who wished to go to any point thereon for hire could do so without making special arrangements. In other words, if he be held to have abandoned his rights on other routes, his operation on U. S. Highway 99 after May 29, 1936, was an attempt to increase his service thereon rather than to abandon it. But the fact that the Commission by certificate might only authorize an "anywhere-for-hire" service in the territory contiguous to U. S. Highway 99 and falling short of Seattle, and compel him to cease operations over other highways altogether did not constitute a justification for its denial of his right to service at all.

The statute gives it sufficient power by the terms of the certificate which it should have issued to protect any type of operations, for it may "specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate" and could attach "to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require." Section 308. The Commission in many cases has heretofore exercised the power conferred upon it by granting the certificate applied for and imposing limitations. The cases of Hibbing, etc. Common Carrier Application,
37 1 M. C. C. 540; George Cassens, etc. Application, 1 M. C. C. 771; Slagle Contract Carrier Application, 2 M. C. C. 127 are illustrative of such action. In these cases the certificate was granted but delimited in terms in accordance with the previous business of the carrier.

The Commission further did not perform its full duty with regard to Maher. The law provides that if any applicant does not qualify as one who was "in bona fide operation as a common carrier by motor vehicle on June 1, 1935 * * * and has so operated since that time * * * then the Commission must go further and find

whether or not the applicant qualifies under Section 307. The particular language used is contained in Section 306 (a) and reads as follows: Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 307 (a) of this chapter and such certificate shall be issued or denied accordingly." The Commission made no finding as to whether the "proposed service * * is or will be required by the present or future public convenience and necessity" as required by the latter section. 307 (a). That body apparently entirely disregarded this clause because no reference is made to it in the opinion or in the order. The briefs filed by the counsel for the Commission indicate clearly this attitude for they insist that it was the duty of Maher to file a new application under Section 307.

It is true that the Commission is given the power to fix by regulation the form of application for certificate but it would have no authority to abrogate the section of the statute under discussion by requiring two different applications. The intent of Congress was to permit no operation by an applicant after certificate had been denied, and it was, therefore, intended that all possibility should be exhausted in the one application. No assumption is necessary to arrive at this conclusion, since Congress require affirmative action by the Commission. The Commission thus acted contrary to the statute in denying a certificate where it failed to make jurisdictional findings of fact.

The Commission, therefore, took action not permitted to it by the law. All the facts required by Congress for the issuance of a certificate under the proviso of 306 (a) were found. The issuance was, therefore, mandatory. The Commission failed to issue a certificate because two erroneous conclusions of law were drawn, first, that an operation in interstate commerce "over a route" and "within a territory" was not entitled to protection when not over a regular route and between fixed termini, and second, that an irregular operation in interstate commerce was abandoned where a regular operation over the same route and within the same territory was carried on. The applicant was further denied rights by the Commission since that body failed to consider his application "in accordance with the procedure provided for in Section 307 (a)."

Based upon these erroneous interpretations, the Commission issued a "cease and desist order." This power was conferred upon that body by the statute under certain circumstances, Sec. 304 (6). But it was not the intention of Congress that when an applicant attempted to have his rights confirmed by a prayer for a certificate, the Commission should be empowered to issue an injunction. "As the Congress itself could not be, so it can not make its agents be, the final judge of its own power under the Constitution. Congress has no power * * * to prescribe what constitutes due process of law for its ascertainment." B. & O. Railroad Co. vs. United States, supra. Judicial

action is required before the Commission could enforce the provisions of the statute designed to prevent operation without a certificate, Sec. 205 (h); United States vs. Griffin, Receiver, No. 63, February 39 28, 1938, United States Supreme Court. This action in issuing a "cease and desist" order was unquestionably affirmative. Maher was commanded to cease an operation which the statute gave him the right to continue. Further, not only the "cease and desist" order but also the denial of certificate was affirmative.

The operation is not illegal under the statute while the application for a certificate is pending. Once certificate is denied by a valid order the operation becomes a crime. This is one of the distinguishing features between the case at bar and Lehigh Valley Railroad Company vs. United States, 243 U. S. 412, 414. There the risk arose from the statute itself. Here there is no risk of criminality until a certificate has been denied by valid order.

In Powell vs. United States, 300 U. S. 276, 285, the Commission struck out a tariff filed by the railroad whereby it included rates relating to a station which it was contended was not upon its line. The court says, in holding the order affirmative in effect " the order * * * confines the Seaboard's service within the junction switching limits, denies leave to that carrier to furnish, and prevents it from furnishing transportation to and from Fort Benning." In the instant case, by refusing to grant the certificate upon the facts found, the Commission would deny leave to plaintiff to furnish and would prevent it from furnishing transportation over U. S. Highway 99 in accordance with its previous service. This case is stronger than the Powell case for here the plaintiff was in actual operation legally before the statute took effect. A railroad has no legal right to operate an extension without a certificate based on a finding of public necessity and convenience. In the absence of the certificate, here the act of operation becomes a crime and is punishable. See Claiborne-Annapolis Ferry Co. vs. United States, 285 U. S. 382, 391–2.

40 The suspension of the order denying the certificate, then, would not leave the situation unchanged but would allow the plaintiff to continue in operation as he has done in the past. By annulment or suspension of the order, the plaintiff would have protection of those rights which Congress sought to confirm. Alton Railroad Co. vs. United States, 287 U. S. 229, 240. On the other hand, immediately upon the order becoming final, the plaintiff will be subjected to damage which is "substantial, immediate and irreparable." Alton Railroad Co. vs. United States, supra. The business of plaintiff, which although subject to regulation, was heretofore carried over the highways of Oregon and Washington with the consent of the states involved (Compare Buck vs. Kuykendall, 267 U. S. 307), is of substantial right and "the unnecessary and uncompensated taking or destruction of any property legally acquired and legally held" is unauthorized. Alton Railroad Co. vs. United States, supra; Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362; cited in B. & O.

Railroad Co. vs. United States, 298 U. S. 349. Even a temporary cessation of operation by plaintiff would cause loss of patronage and might destroy his business. The whole order in this case, therefore, is affirmative in its effect and displays the intention of the Commission to cut off the rights which the Congress itself granted to the plaintiff. Therefore, the court must go behind the assigned grounds and determine the validity of the order independently. Wallower vs. United States, 32 F. (2d) 524.

Inquiry as to what action the court should take under these circumstances must be made next. The order, to cease, and desist from all operation in interstate commerce, at least, must be set aside. Since the statute gives the court the power to annul an order in whole or in part, it makes no difference whether severable or not, it may
41 be annulled. It is said to create an anomolous situation, if the "cease and desist" order be set aside while the provisions of law prevent the plaintiff from operating after the refusal of the certificate. See Chesapeake and Ohio Railway Company vs. United States, 35 F. (2d) 769, 773. But such a situation cannot arise, since the paragraph denying the certificate is likewise affirmative in effect, and action should be taken in regard to it, also. It is said that this court, at least, has no power to compel the Commission to issue the certificate either by mandatory decree (Piedmont & Northern Railway Co. vs. United States, 280 U. S. 469) nor can the court, itself, issue the certificate, because the various limitations upon the terms of such a certificate are committed to the discretion of the Commission under Section 308. See The Chicago Junction Case, 264 U. S. 258, 264. The answer to this proposition is found in Alton Railroad Company vs. United States, supra, where it is said: "The court is not asked to prescribe reasonable divisions, or to direct that they be prescribed by the Commission. The court is asked to find that the Commission denied the Alton a constitutional right as a result of acting upon erroneous principles of law, and therefore to enjoin that part of the order."

The court has the power to suspend an order of the Commission. cnf. Atlanta, B. & C. R. Co. vs. United States, 37 F. (2d) 401; United States v. Atlanta, B. & C. R. Co., 282 U. S. 522, 527. If this paragraph, denying the certificate, were suspended, the application would still be pending, and the plaintiff would have the right to operate until the Commission granted or refused the application under the terms of the statute which provides "pending the determination of any such application, the continuance of such operation shall be lawful." Sec. 306 (a). The illegality of the operation which would be occasioned by the denial of the certificate would
42 not then exist until further action was taken. The Commission could thereupon either upon further hearing or upon the record now in its possession grant to plaintiff a certificate delimited under the terms of the statute or deny the certificate upon findings which would conform with the statutory requirements. Until such action

is taken, the terms of paragraph one of the order, denying certificate, are suspended. Paragraph two of the order, commanding Maher to cease and desist from further operations in interstate commerce is set aside.

Concurring opinion

CLAUDE MCCOLLOCH, District Judge, specially concurring:

I desire to express my special approval of that part of Judge Fee's opinion to the effect that whatever rights a carrier had as of June 1, 1935, should be respected and declared by the Interstate Commerce Commission, and certificate issued for the same. It would be a harsh rule to deny an applicant all rights simply because he claimed more or even a different right than he was entitled to. The extension of the jurisdiction of the Interstate Commerce Commission into the field of motor transportation is new and advanced legislation, and the Act should be construed to avoid injustice to the many small operators engaged in making their living in this field at the time the law went into effect.

43 *Dissenting opinion*

HANEY, *Circuit Judge, dissenting.*

I dissent.

First. Defendants challenge the jurisdiction of this court. Under the statute, our jurisdiction extends to "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." 28 U. S. C. A. 41 (28). The words "any order" as there used, mean "any affirmative order." Procter & Gamble v. United States, 225 U. S. 282, 293, 294; United States v. Griffin, — U. S. —, February 28, 1938. That part of the order which denies the application for a certificate of public convenience and necessity is, I believe, an order which is negative in substance and form, over which we have no jurisdiction. Piedmont & Nor. Ry. v. United States, 280 U. S. 469.

No contention is here made that we have jurisdiction under 205 (h) of the act. (See Coordinator Eastman's memorandum to the Senate Interstate Commerce Committee suggesting amendments to Senate Bill 1639, which is the act in question.)

Under the express words of the statute, however, our jurisdiction extends to part of an order. Petitioner contends that the cease and desist part of the order is affirmative.

I believe a cease and desist order is ordinarily subject to review by this court. Tap Line Cases, 234 U. S. 1.

Defendants contend, however, that the order is not separable because the action of the court would result in an anomalous situation, and rely on Chesapeake & Ohio Ry. Co. v. United States (D. C. W. Va.), 35 F. (2d) 769, affirmed 283 U. S. 35. That case does not hold that in such situation the order is not reviewable, and in fact is not in point,

because there the statute made "no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed con-
44 struction." 283 U. S. 35, 42. Here the Commission had no such latitude and discretion, for it was required to issue the certificate on proof of specified facts.

Since the order was a command to petitioner, I believe it is an affirmative order, and within our jurisdiction.

Second. The extent of our reviewing powers is stated in Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 547. So far as is here material, the order in question is final, unless "based upon a mistake of law" under that case. There is no dispute as to the facts. Petitioner was on June 1, 1935, in operation on irregular routes within the territory for which application was made. The Commission construed the act to mean that petitioner was not entitled to a certificate covering a route between fixed termini, unless he was operating on a regular route on and since June 1, 1935, and defendants contend that such construction was correct.

I believe the Commission has not misconstrued the act. The "carrier" referred to in 306 (a) is defined in 303 (a) (14) to include those which operate "over regular or irregular routes." The fact that petitioner, on June 1, 1935, was operating over an irregular route, does not prevent issuance of a certificate, because of that statute. Under 306 (a) petitioner is entitled to a certificate "if (he) * * * was in bona fide operation * * * on June 1, 1935, over the route or within the territory for which application is made and has so operated since that time * * *" Petitioner although he was in bona fide operation on June 1, 1935, over an irregular route, has not "so operated since that time" because he commenced operations over a regular route on May 29, 1936, and has continued. In other words, I believe the statute means that if a carrier was operating over a regular route on June 1, 1935, he must have so continued after that date in order to obtain a certificate under 306 (a); and that if a carrier was operating over an irregular route on June 1, 1935.
45 he must have so continued after that date to obtain such a certificate.

Third. By 28 U. S. C. A. 306 (a), the Commission must issue a certificate upon proof of certain facts. If such facts are not proven, then "the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this chapter and such certificate shall be issued or denied accordingly." Under the latter section proof of different facts is required before a certificate shall be issued. There is here no allegation in the bill that there was proof of such facts. There were no findings made by the Commission of the required facts. The evidence is not before us. Under such circumstances, we should presume that the Commission performed its duties and therefore refused to grant a certificate under 307 (a) because there was no showing of the required facts. I do not

believe we should declare that the Commission should have determined the application under 307 (a) when we do not know whether there was any evidence before it to consider.

Fourth. Did the Commission have power to make the cease and desist order? I think that it had such power. Under 306 (a) such a carrier may not operate without a certificate of public convenience and necessity. Violation of that section is made a crime. 322 (a). Express power to make the order is given by 304 (6) which provides: "It shall be the duty of the Commission— * * * (6) to administer, execute, and enforce all other provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration * * *"

For these reasons I think the bill should be dismissed.

46 [File endorsement omitted.]

47 In United States District Court

[Title omitted.]

Findings of fact and conclusions of law

Filed Sept. 7, 1938, as of July 9, 1938

Now at this time the above entitled matter comes on regularly for trial before the statutory court, convened pursuant to the Urgent Deficiency Act (Title 28, U. S. C. A. Sec. 41 (28) and Secs. 43–48), and, composed of the Honorable Bert E. Haney, Judge of the United States Circuit Court of Appeals for the Ninth District, and the Honorable James Alger Fee, and Claude McCulloch, Judges of the United States District Court of the United States for the District of Oregon. Plaintiff appearing in person, and by William L. Harrison and Edward O. Doxey, his attorneys; the United States of America appeared by and through Elmer B. Collins, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., and Allan Hart, Assistant to the United States District Attorney, Portland, Oregon; and the Interstate Commerce Commission was represented by Nelson Thomas, its attorney, and it

Appearing to the Court that this case is regularly at issue on the bill of complaint, answer of the Interstate Commerce Commission, and the answer of the United States of America, and it

Appearing that the parties hereto have stipulated that the Court should consider the evidence in this matter as found by the Interstate Commerce Commission, which is as follows; to-wit:

"Applicant has been engaged in the transportation of passengers since 1931. Prior to the institution of his present regular operation between Portland and Seattle on May 29, 1936, he conducted an irregular, so-called anywhere-for-hire operation in Oregon with occasional trips to points in Washington. This operation consisted mostly of the transportation of groups of employees from Portland to logging camps

in Oregon and Washington. Baseball and basketball teams were also transported. Applicant maintained no terminal facilities. He obtained his business principally through contacts with employment agencies at Portland where men were hired for work at logging camps. While the application alleges that trips were made over the considered route on an average of three times per week, applicant testified that this was only an estimate and that "Sometimes I went into the State of Washington twice a day with two cars; and sometimes I didn't go into the State of Washington for a month." Operation was conducted in Oregon under an anywhere-for-hire permit issued by the Public Utilities Commission of Oregon. Two vehicles of 10 or 11 passenger capacity were used. Applicant did not publish a tariff but based his charges on the mileage involved on each trip.

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"Applicant kept detailed records with respect to his operations in Oregon for the purpose of making reports to the authorities of that State. No record, however, was kept of operations in Washington for the reason that no reports were made to the authorities of that State. In instances where trips were made to Washington applicant's records would show the destination point as Vancouver, Wash., or Vancouver Bridge, the point at which the State of Washington was entered. The oral testimony of applicant's witnesses is that trips were made at various times between 1933 and 1936 to Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, Wash. It appears that 11 such trips were made in 1935 and six during 1936 between January and April. The evidence does not disclose, however, what particular destinations were served on 16 trips just mentioned, but only that trips to points in Washington were made.

"Although the application alleges that regular-route operations were conducted on U. S. Highway 99 between Portland and Seattle and that all intermediate points were served on June 1, 1935, it is to be noted that many of the points specifically referred to in the evidence are located on other highways. For example, Cathlamet and Deep River are on U. S. Highway 830; Raymond and Aberdeen are on U. S. Highway 101; Neah Bay is in the extreme *m*orthwestern corner of the State a considerable distance from any point on U. S. Highway 99 between Portland and Seattle; and Spokane is in the extreme eastern part of the State many miles from U. S. Highway 99. Prior to the institution of his scheduled service between Portland and Seattle; applicant had not made a trip to Seattle since about 1933. There is no evidence of service at any time to most of the intermediate points on the considered route, nor is it shown that passengers were transported on return trips to Portland."

"At present applicant is engaged in the transportation of passengers between Portland and Seattle over U. S. Highway 99, serving intermediate points. Operations are conducted on a regular daily schedule between fixed termini. Fares are based on a published tariff.

A 25-passenger bus, purchased particularly for this service, is regularly used, and applicant also owns a 10-passenger vehicle which is used when needed. Operations as at present carried on were commenced on May 29, 1936, under the trade name Interstate Busses, a trade name not theretofore used."

and it

Appearing pursuant to said Findings, the Interstate Commerce Commission did, on the 27th day of October, 1937, enter the following order:

1. "It is ordered, that said application be, and it is hereby, denied effective December 10, 1937."

2. "And it is further ordered, that applicant be, and he is hereby notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle."

and from which order the applicant herein appealed; and

The court having heard the arguments of counsel, and having taken the matter under advisement, and directed counsel for respective parties to submit briefs, which said briefs have been submitted; and being now fully advised as to the premises herein, makes the following as its Findings of Fact, to-wit:

49 FINDINGS OF FACT

I

That the plaintiff (Dan E. Maher, applicant) has been engaged in the transportation of passengers for hire in interstate commerce between the states of Oregon and Washington since 1931.

II

That the transportation of passengers for hire in interstate commerce performed by the plaintiff prior to May 29, 1936, was not on a regular schedule.

III

That the plaintiff (Dan E. Maher, applicant) was in bona fide operation as a common carrier by motor vehicle of passengers and their baggage for hire in interstate commerce between the states of Oregon and Washington over U. S. Highway 99 on June 1, 1935, and that he has so operated since that time.

IV

That all service performed was in part over U. S. Highway 99 between the states of Oregon and Washington and more particularly between Portland, Oregon, and Deep River, Cathlamet, Raymond, Aberdeen, Fall City, LaSalle River, Chehalis, Olympia, Seattle, Cen-

tralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, which points are all in the state of Washington.

V

That the court takes judicial notice that U. S. Highway 99 is in part the most convenient and feasible route between Portland, Oregon, and each and all of the points above mentioned.

VI

That all of the operation of the plaintiff as a common carrier of passengers for hire between Portland, Oregon, and the points above mentioned was over a route, to-wit, U. S. Highway 99, and within the territory, to-wit, the territory contiguous to U. S. Highway 99 for which application was made.

VII

That such transportation was being performed on June 1, 1935.

VIII

That plaintiff commenced a regular termini service on May 29, 1936, between Portland, Oregon, and Seattle, Washington, over U. S. Highway 99, and has so operated since that time

50

IX

That the court takes judicial notice that Deep River, Cathlamet, Raymond, Aberdeen, Fall City, LaSalle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, in the state of Washington, are within the territory for which plaintiff made application.

CONCLUSIONS OF LAW

I

The whole order of the Interstate Commerce Commission is affirmative, and, by virtue thereof, the Court has jurisdiction to entertain the suit.

II

Bona fide operation over a route, or over a number of routes, or within a territory, on June 1, 1935, requires the issuance of a certificate.

III

The issuance of a certificate should not be denied because plaintiff was not performing a fixed termini service on June 1, 1935.

IV

The establishment of a termini service by the plaintiff on May 29, 1936, was not an abandonment of the previous service over U. S. Highway #99.

V

The issuance of a certificate is mandatory.

VI

The Interstate Commerce Commission, under the Motor Carrier Act of 1935, when once any application is before it, is required to determine the matter of public convenience and necessity, and its failure to so determine upon the application before it, was erroneous.

VII

The law provides that if any applicant does not qualify as one who was "in bona fide operation as a common carrier by motor vehicle on June 1, 1935 * * * and has so operated since that time * * * then the Commission must go further and find whether or not the applicant qualifies under Section 307. The particular language used is contained in Section 306 (a) and read as follows: "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 307 (a) of this chapter and such certificate shall be issued or denied accordingly." The Commission made no finding as to whether the "proposed service * * * is or will be required by the present or future
51 public convenience and necessity" as required by the latter section. 307 (a). That body apparently entirely disregarded this clause because no reference is made to it in the opinion or in the order.

Done and dated at Portland, in the District of Oregon, this 7th day of September 1938 nunc pro tunc as of the 9th day of July 1938.

_____,
Judge of the United States Circuit Court of Appeals.

JAMES ALGER FEE,
Judge of the United States District Court for the District of Oregon.

CLAUDE MCCOLLOCH,
Judge of the United States District Court for the District of Oregon.

[File endorsement omitted.]

53 In United States District Court for the District of Oregon

No. E 9723

DAN E. MAHER, DOING BUSINESS AS INTERSTATE BUSSES, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Decree

Filed July 9, 1938

Now at this time the above entitled matter comes on regularly for trial before the statutory court convened pursuant to the Urgent Deficiency Act (Title 28, U. S. C. A. Sec. 41 (28) and Secs. 43–48) and composed of the Honorable Bert E. Haney, Judge of the United States Circuit Court of Appeals for the Ninth District, and the Honorable James Alger Fee, and Claude McColloch, Judges of the United States District Court of the United States for the District of Oregon. Plaintiff appearing in person and by William L. Harrison and Edward O. Doxey, his attorneys, the United States of America appeared by and through Elmer B. Collins, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., and Allan Hart, Assistant to the United States District Attorney, Portland, Oregon; and the Interstate Commerce Commission was represented by Nelson Thomas, its attorney, and it

Appearing to the Court that this case is regularly at issue on the bill of complaint, answer of the Interstate Commerce Commission, and the answer of the United States of America; the facts were stipulated in open court to be as found by the Commission in the Findings of Fact entered by said Commission, and pursuant to which it entered, on October 27, 1937, the following order:

1. "It is ordered, that said application be, and it is hereby, denied effective December 10, 1937."

2. "And it is further ordered, that applicant be, and he is hereby notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle."

and from which order the applicant herein appealed; and

54 The Court having heard the arguments of counsel, and having taken the matter under advisement, and directed counsel for respective parties to submit briefs, which said briefs have been submitted; and being now fully advised as to the premises herein, it is

Ordered and adjudged that of the order of the Commission entered at a session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 27th day of October 1937,

the same bearing No. MC 59620, in the matter of Dan E. Maher, Common Carrier Application, namely, that part reading as follows:

"It is ordered, that said application be, and it is hereby, denied, effective December 10, 1937."

be, and the same is hereby suspended until such a time as the Commission either upon further hearing, or upon the record now in its possession, grants to the plaintiff a certificate delimited under the terms of the statute, or denies a certificate in conformity with the statutory requirements, and it is further

Ordered and adjudged that, namely, that part of the order reading as follows:

"And it is further ordered, that applicant be, and he is hereby notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle."

be, and the same is hereby annuled, cancelled, and set aside.

Done and dated at Portland, in the District of Oregon, this 9th day of July 1938.

_____,
Judge of the United States Circuit Court of Appeals.

JAMES ALGER FEE,
Judge of the United States District Court for the District of Oregon.

CLAUDE MCCOLLOCH,
Judge of the United States District Court for the District of Oregon.

Service accepted this 6th day of July 1938.

M. B. STRAYER,
Assistant United States District Attorney for the District of Oregon.

Exception to the entry of this order is allowed to each defendant.

JAMES ALGER FEE.
CLAUDE MCCOLLOCH.

[File endorsement omitted.]

56 In United States District Court

[Title omitted.]

Petition for appeal

Filed September 7, 1938

The United States of America and the Interstate Commerce Commission, defendants in the above entitled cause, feeling themselves aggrieved by the final decree entered therein by this Court on July 9, 1938, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein they consider the decree erroneous are set forth in the assignment of errors accompanying this petition and to which reference is hereby made.

Said defendants pray that a transcript of record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated September 6, 1938.

CARL C. DONAUGH,
United States Attorney.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
NELSON THOMAS,
Counsel Interstate Commerce Commission.

Service accepted Sept. 6, 1938.

WILLIAM L. HARRISON.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Assignment of errors

Filed September 7, 1938

United States of America and Interstate Commerce Commission, fendants in the above-entitled cause, now come and file the follow- g assignment of errors in connection with their petition for an peal from the final decree entered by this Court on July 9, 1938, said cause:

The District Court erred:

1. In entering the decree suspending, annulling and setting aside e order of the Interstate Commerce Commission.

2. In holding that the Commission's order was affirmative and not egative," and that the Court had jurisdiction to review the order.

3. In holding that, upon the facts found and stated in the Commis- n's report, Section 206 of the Motor Carrier Act, 1935, made it ndatory upon the Commission to issue to the plaintiff a certificate public convenience and necessity.

4. In holding that plaintiff's operation of the "any-where-for-hire" vice on June 1, 1935, and thereafter until he abandoned it on May 1936, entitled him under the "grandfather" proviso of said Section to a certificate authorizing the continuance of the Portland-

Seattle operation, instituted May 29, 1936, over U. S. Highway 99, for which plaintiff's application was made to the Commission.

5. In holding that plaintiff's operation of the "any-where-for-hire" service on June 1, 1935, and thereafter until he discontinued it on May 29, 1936, entitled him under said "grandfather" proviso to a certificate authorizing either the re-establishment of all or a part
59 of the abandoned "any-where-for-hire" operation or the continuance of the new Portland-Seattle operation.

6. In holding that the Commission, upon the facts found by it, acted contrary to law in issuing its order denying plaintiff's application for a certificate and directing that he cease from all operations as an interstate motor carrier.

7. In holding that the Commission was without power to deny plaintiff's applicaton for a certificate on the ground that the service for which the application was made was not the service conducted by plaintiff on June 1, 1935.

8. In holding that the Commission was without power to deny plaintiff's application for a certificate on the ground that he had, on May 29, 1936, discontinued the service in which he was engaged on June 1, 1935.

9. In holding that plaintiff's abandonment of "any-where-for-hire" service on May 29, 1936, and his institution on that date of the daily scheduled Portland-Seattle service did not destroy his right under the "grandfather" clause to a certificate authorizing operation of any service over U. S. Highway 99.

10. In holding upon the facts found by the Commission that plaintiff "might well be confined to an any-where-for-hire service upon U. S. Highway 99 and compelled to cease his 'fixed termini' operation, but he was still operating in interstate commerce over a route and within a territory and could not, therefore, be denied a certificate."

11. In holding that: "The law provides that if any applicant does not qualify as one who was 'in bona fide operation as a common carrier by motor vehicle on June 1, 1935 * * * and has so operated since that time * * * ' then the Commission must go further and find whether or not the applicant qualifies under Section 307."

12. In holding, despite the fact that plaintiff's application was made and the right to the certificate claimed and supported solely under the "grandfather" clause of section 206, that the Commission acted contrary to law and failed to perform its full duty in merely denying the application as made and in failing to make findings of fact "as to whether the 'proposed service * * *' is or will be required by the present or future public convenience and necessity' as required by the latter section, 307 (a)."

13. In entering the decree suspending that part of the Commission's order which denies plaintiff's application for a certificate and annulling and setting aside that part of the order which directs plaintiffs to cease operating as an interstate motor carrier.
plaintiff to cease operating as an interstate motor carrier.

60 14. In failing and refusing to hold that the Commission's order is valid and lawful in all respects, and in refusing to enter a decree dismissing the bill of complaint.

CARL C. DONAUGH,
United States Attorney.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
NELSON THOMAS,
Counsel, Interstate Commerce Commission.

Dated September 6th, 1938.

Service of a copy of the foregoing assignment of errors acknowledged this September 6th, 1938.

WILLIAM L. HARRISON,
Attorney for Plaintiff-Appellee.

[File endorsement omitted.]

62 In United States District Court

[Title omitted:]

Order allowing appeal

Filed September 7, 1938

In the above-entitled cause, the United States of America and the Interstate Commerce Commission, defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered July 1938, and having also made and filed an assignment of errors, and statement of jurisdiction, and having in all respects conformed to the statutes and rules of court in such case made and provided, it is Ordered and decreed that the appeal be, and it is hereby, allowed prayed.

This 7th day of September 1938.

JAMES ALGER FEE,
United States District Judge.

Service of a copy of the foregoing order allowing appeal is hereby knowledged this 6th day of Sept. 1938.

WILLIAM L. HARRISON,
Solicitor for Plaintiff.

File endorsement omitted.]

[Citation in usual form showing service on Wm. L. Harrison, filed Sept. 7, 1938, omitted in printing.]

68 In United States District Court

[Title omitted.]

Notice of appeal

Filed Sept. 9, 1938

To the ATTORNEY GENERAL OF THE STATE OF OREGON:

Pursuant to the Urgent Deficiencies Act of October 22, 1913, 38 Stat. L. 221, you are hereby notified that the defendants, United States of America and Interstate Commerce Commission have taken an appeal to the Supreme Court of the United States from the final decree entered by the District Court on July 9, 1938, in the above-entitled cause, and the citation makes the appeal returnable within sixty (60) days from the date thereof.

CARL C. DONAUGH,
United States Attorney.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
NELSON THOMAS,
Counsel, Interstate Commerce Commission.

Service of a copy of the above notice acknowledged this 7th day of September 1938.

I. H. VAN WINKLE,
Attorney General of the State of Oregon.

[File endorsement omitted.]

70 In United States District Court

[Title omitted.]

Objections of defendants to findings of fact and conclusions of law entered by the court

Filed Sept. 20, 1938

Defendants, United States and Interstate Commerce Commission, object and except to the findings of fact and conclusions of law adopted and entered by the court in the above entitled cause.

1. The findings of fact are, as a whole, inadequate and insufficient, and constitute an incomplete, inaccurate, and erroneous statement of the facts in the case.

2. This court's opinion states the fact that "No evidence was introduced except a copy of the findings of the Commission which are accepted as the facts"; therefore, this court not only lacked an evidential basis for independent findings of its own, but also was bound by the

facts found by the Interstate Commerce Commission and set forth in its report.

3. The court's statement in the third paragraph of the introduction to its findings "that the parties hereto have stipulated that the court should consider the evidence in this matter as found by the Interstate Commerce Commission," is erroneous because no evidence was introduced before the court. The "stipulation" amounted to nothing more than plaintiff's declaration that he elected to proceed to trial upon the bill of complaint, including the Commission's report of its findings and conclusions of fact and its order, and the answers of the defendants, rather than to introduce before the court the record of testimony taken and considered by the Commission.

4. The quotations from the Commission's report, on pages 2 and 3 of the court's findings, are incomplete and present an erroneous statement of the facts because they omit and fail to include sev-
71 eral paragraphs of the Commission's report containing findings of fact which are essential to a proper consideration of the case.

5. The Court's findings of fact, as a whole, present an erroneous and misleading statement of the case in that, among other things, they fail to describe either the irregular "anywhere-for-hire" service in which plaintiff was engaged on June 1, 1935, and until May 29, 1936, or the regular scheduled Portland-Seattle service instituted on May 29, 1936, and fail completely to reflect or disclose the fact found by the Commission from the evidence that the service rendered by plaintiff on June 1, 1935, was a totally different service from the Portland-Seattle service established by plaintiff on May 29, 1936, for which his application for a certificate was made.

6. There was nothing before the court from which it could find the fact stated in its Finding I that plaintiff has been engaged in transportation of passengers between Oregon and Washington from 1931 to the date on which the court's findings were entered; the only facts before the court in that respect being those stated in the Commission's report rendered October 27, 1937. The bill of complaint, dated December 10, 1937, alleges that plaintiff was then a common carrier but this allegation was not admitted in defendants' answers, and plaintiff submitted no evidence to the court concerning his status or operations at the time of the trial.

7. There being no evidence before the court, there was no factual or evidential basis upon which it could find the facts stated in Findings II, III, and IV; and each of said Findings is erroneous and inaccurate in that it is different from, and contrary to, the facts found by the Commission.

8. Finding V is beyond the court's authority and is erroneous because, even if true, it assumes, without any factual support of evidence, that plaintiff used or traveled "the most convenient and feasible route" between Portland, Oregon, and the points mentioned in Finding IV. The only fact before the court concerning plaintiff's use of U. S. Highway 99 in his "anywhere-for-hire" service is the statement in the Commission's report that "while U. S. Highway 99 probably was used for

at least part of the distance on most, if not all, of applicant's trips to Washington, the evidence wholly fails to sustain applicant's claim that a regular common-carrier service over that route between Portland and Seattle, with service at all intermediate points, was conducted.

9. Findings VI and VII are erroneous and insufficient in that:

(a) they are contrary to and different from the facts found by the Commission concerning plaintiff's operation for his "any-
72 where-for-hire" service; (b) they are without factual basis insofar as they refer to plaintiff's application to the Commission and the service which plaintiff sought authority to perform because, as stated in the court's opinion, the application was not introduced before the court.

10. Finding VIII is erroneous and insufficient in that it fails to describe the Portland-Seattle service instituted by plaintiff on May 29, 1936, and fails to show the difference between that service and the "anywhere-for-hire" service performed by plaintiff on June 1, 1935; and, further, said finding is without factual basis for the statement that "plaintiff has so operated since that time" insofar as the statement applies to the period between October 27, 1937, when the Commission rendered its report, and the date on which said finding was made.

11. Finding IX is erroneous and without factual basis before the court in that plaintiff's application was not before the court, and, further, the application was not made for authority to operate "within a territory," but to operate between Portland and Seattle over U. S. Highway 99, as shown by the second paragraph of the Commission's report.

12. The court's Conclusion of Law I is erroneous in that the Commission's order is "negative" and the court was therefore without jurisdiction to review it.

13. Conclusion II is vague and erroneous insofar as its application to the facts of this case is concerned, in that, (a) it does not specify whether the certificate said to be required shall authorize the operation in which plaintiff was engaged on June 1, 1935, or the operation established on May 29, 1936, for which the Commission's report shows that the application was made; (b) it ignores the requirement of the Motor Carrier Act, 1935, that to obtain a certificate under the "grandfather" clause an applicant must show not only that he was engaged in bona fide operation of a motor carrier service on June 1, 1935, but also that he "has so operated since that time;" (c) the facts found by the Commission which bind the court in this case show that, although plaintiff was in bona fide operation as an "anywhere-for-hire" motor carrier on June 1, 1935, he abandoned the operation of that service on May 29, 1936, and established "a new and different service from that previously conducted."

14. Conclusion III is erroneous, misleading, and without application to the facts found by the Commission and upon which it denied plaintiff's application.

73 15. Conclusion IV is erroneous and is a finding of fact and not a conclusion of law; and it misstates and is contrary to the fact found by the Commission, that on May 29, 1936, plaintiff discontinued entirely the irregular "anywhere-for-hire" service conducted by him on June 1, 1935, and established an entirely new and different regular daily passenger service between Portland and Seattle exclusively over U. S. Highway 99.

16. Conclusion V is an incomplete and erroneous statement of the law in that, while the issuance of a certificate may be mandatory if an applicant establishes that he was in bona fide operation as an interstate motor carrier on June 1, 1935, and "has so operated since that time," it is not mandatory upon the facts found by the Commission in this case.

17. Conclusions VI and VII are erroneous statements of the requirements of the Motor Carrier Act, 1935, in that no language of the Act requires that the Commission consider or determine the question of public convenience and necessity in acting upon an application for a certificate made and supported solely under the "grandfather" clause, as it was in this case. Said conclusions construe the Act erroneously to require the Commission, before denying an application made and supported solely under the "grandfather" clause, (a) to make the futile finding or mere statement that public convenience had not been shown to require the operation, because no evidence thereof is submitted by the applicant, or (b) to assume the burden of making an independent investigation and development of facts concerning public convenience and necessity when such applicant does not rely upon that ground for a certificate, and thus to enlarge the grounds upon which such applicant claims a certificate, regardless of whether he consents to such enlargement.

18. The Conclusions of Law are, as a whole, erroneous and contrary to the provisions of the Motor Carrier Act, 1935, and proper and reasonable interpretation thereof.

CARL C. DONAUGH,
United States Attorney.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
NELSON THOMAS,
Counsel, Interstate Commerce Commission.

Dated September 19, 1938.

Service of a copy of the foregoing objections acknowledged this September 19th, 1938.

WILLIAM L. HARRISON,
Attorney for Plaintiff.

[File endorsement omitted.]

74 And afterwards, to wit, on the 28th day of September 1938, there was duly filed in said Court, a Praecipe for Transcript of Record, in words and figures as follows, to wit:

75 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed Sept. 28, 1938

To the CLERK:

You will please prepare a transcript of the record in the above entitled cause to be transmitted to the Clerk of the Supreme Court of the United States pursuant to the appeal heretofore taken, and include in said transcript the following:

1. Bill of complaint.
2. Answer of United States of America.
3. Answer of Interstate Commerce Commission and Exhibit A thereto.
4. Order convening the three-judge District Court.
5. Opinion of the Court, including concurring opinion of Judge McColloch and dissenting opinion of Circuit Judge Haney.
6. Findings of Fact and Conclusions of Law.
7. Exceptions of United States and Interstate Commerce Commission to Findings of Fact and Conclusions of Law.
8. Order or final decree.
9. Petition for appeal.
10. Assignment of errors.
11. Statement as to Jurisdiction.
12. Order allowing appeal.
13. Notice (pursuant to Rule 12 of the Supreme Court) of service on appellee of petition for appeal, order allowing appeal, assignment of errors and statement as to jurisdiction, and acknowledgment of service thereof.

76 14. Citation on appeal.

15. Notice to Attorney General of Oregon, and acknowledgement of service thereof.
16. Docket entries in proper order.
17. Praecipe for transcript of record.
18. Clerk's certificate.

CARL C. DONAUGH,
United States Attorney.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
NELSON THOMAS,
Counsel, Interstate Commerce Commission.

Dated September 6th, 1938.

Service of copy of the above praecipe acknowledged this September 6th, 1938.

WILLIAM L. HARRISON,
Attorney for plaintiff-appellee.

[File endorsement omitted.]

77 In United States District Court

[Title omitted.]

Docket entries

December 15, 1937—Filed Bill of Complaint (no process).
" 28, " —Filed affidavit of mailing and service.
" 28, " —Filed motion of hearing before three judges.
January 8, 1938—Filed Answer of Interstate Commerce Commission.
" 18, " —Filed Answer of United States.
" 18, " —Entered order to set for February 11, 1938.
February 11 1938—Record of final hearing (Haney, Fee, McColloch).
" 11, " —Entered order allowing ptff. 10 days and deft. 10 days thereafter to submit briefs.
" 11, " —Filed brief of defendant, Int. Com. Com. in triplicate.
" 21, " —Filed brief of plaintiff in triplicate.
" 25, " —Filed letter from Atty. Thomas re extending date of its order to March 21, 1938.
March 3, 1938—Filed reply brief of Interstate Commerce Com. in triplicate.
June 16, " —Filed opinion.
July 9, " —Filed and entered final decree for plaintiff.
September 7, " —Filed and entered findings of fact and conclusions of law, nunc pro tunc as of July 9, 1938.
" 7, " —Filed petition for appeal.
" 7, " —Filed and entered order allowing appeal.
" 7, " —Filed assignment of errors.
" 7, " —Filed citation.
" 7, " —Filed Statement as to jurisdiction.
" 7, " —Filed notice of service of copies.
" 9, " —Filed notice of appeal.
" 20, " —Filed objections of defts. to findings of fact and conclusions of law.
" 28, " —Filed praecipe for transcript of record.

79 [Clerk's certificate to foregoing transcript omitted in printing.]

80 In Supreme Court of the United States

Statement of points and designation of record to be printed

Filed Oct. 20, 1938

I.

United States of America and Interstate Commerce Commission, appellants, state that in their brief and oral argument on their appeal in the above entitled cause they will rely upon all the points stated in their assignment of errors therein.

II.

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellants, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

N. A. TOWNSEND,
Acting Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

SEPTEMBER 6TH, 1938.

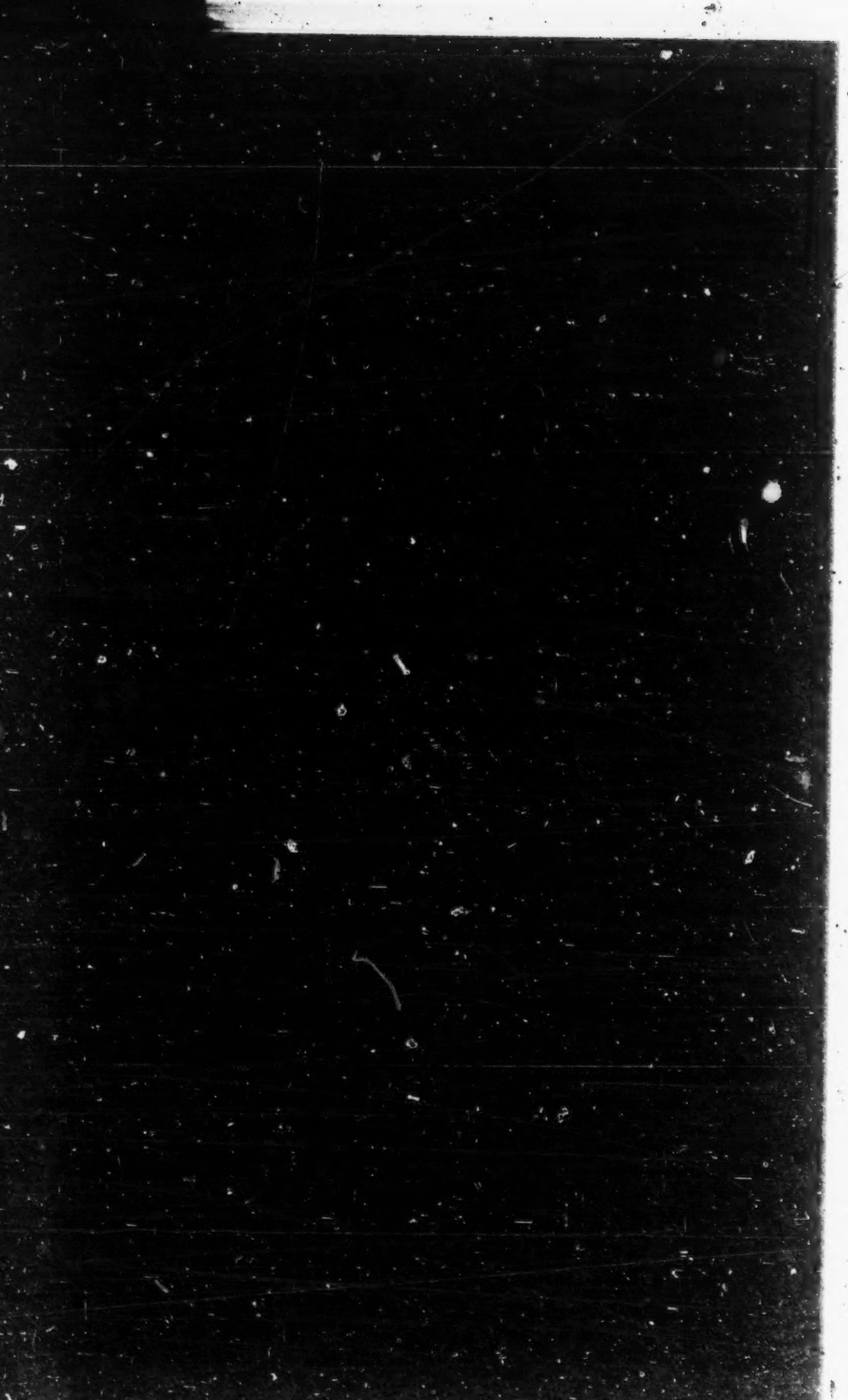
Service of a copy of the above Statement of Points and Designation of Record to be Printed acknowledged September 6th, 1938.

WILLIAM L. HARRISON,
Attorney for Appellee.

[File endorsement omitted.]

[Endorsement on cover:] File No. 42,917. Oregon, D. C. U. S. Term No. 432. The United States of America and Interstate Commerce Commission, Appellants, vs. Dan E. Maher, Doing Business as Interstate Busses. Filed October 20, 1938. Term No. 432 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938



In the District Court of the United States for the District of Oregon

EQUITY No. E–9723

DAN E. MAHER, DOING BUSINESS AS INTERSTATE BUSSES, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

STATEMENT AS TO JURISDICTION

The compliance with Rule 12 of the Supreme Court of the United States, as amended, The United States of America and Interstate Commerce Commission submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the final decree complained of its conferred by:

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. C. Sup. III, Title 28, Sec. 45a);

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U. S. C., Title 28, Sec. 345);

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Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U. S. C., Title 28, Secs. 45 and 47a, Sup. III);

Motor Carrier Act, 1935 (c. 498, 49 Stat. 543; U. S. C., Sup. I, Title 49, Sec. 305 (h)).

B. The statute of the United States, the construction of which is involved herein, is the Act of August 9, 1935 (c. 498, 49 Stat. 543, secs. 206–208; U. S. C., Sup. I, Title 49, secs. 306–308), known as the Motor Carrier Act, 1935, which amends the Interstate Commerce Act by adding thereto "Part II," and provides for regulation of interstate motor carriers by the Interstate Commerce Commission. The pertinent sections of the Act read as follows:

> SEC. 206 (a).[1] No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or

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[1] This section was amended by Section 8 of the Act of June 29, 1938, Chapter 811, Public No. 777, 75th Congress, 3d Session, as follows:

Section 206 (a) of said Act is hereby amended by striking out "No common carrier" at the beginning and inserting in lieu thereof the following: "Except as otherwise provided in this section and in section 210a, no common carrier".

Other sections of the Motor Carrier Act which were amended by the Act of June 29, 1938, including Section 210a, are not involved in this case.

Sections 207 and 208 were *not* amended.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied

foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over

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by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

SEC. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the require-

which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition re-

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ments, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

Sec. 208. (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms

quiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not

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and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

(d) A certificate for the transportation of passengers may include authority to transport in the same vehicle with the passengers, newspapers, baggage of passengers, express, or mail, or to transport baggage of passengers in a separate vehicle.

be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

C. The decree sought to be reviewed was entered on July 9, 1938, and the petition for appeal was presented to the District Court on September 7th, 1938.

D. Plaintiff brought this suit to enjoin and annul an order issued October 27, 1937, by the Interstate Commerce Commission in a proceeding under the Motor Carrier Act, 1935, entitled "*No. MC–59260, Dan E. Maher, Common Carrier Application.*" The order denies plaintiff's application to the Commission, filed January 24, 1936, for a certificate of public convenience and necessity authorizing operation as a common carrier of passengers and their baggage by motor vehicle between Portland, Oregon, and Seattle, Washington, over U. S. Highway 99. The application was filed pursuant to Section 206 of the Act, which prohibits operation by an interstate motor carrier without a certificate

of public convenience and necessity from the Commission, but provides,[2] however, that if any such carrier was in bona fide operation on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof of public convenience and necessity for such operation. Plaintiff, having made application for the Portland-Seattle operation over U. S. Highway 99, claimed the certificate solely on the ground that he was in bona fide operation as an interstate motor carrier on June 1, 1935.

The Commission found from the evidence that plaintiff was not engaged on June 1, 1935, in the Portland-Seattle operation described in the application and for which the certificate was claimed; that this operation had not been established by plaintiff until May 29, 1936; that the operation was under the name "Interstate Busses," a trade name not theretofore used by plaintiff, and was a regular scheduled daily passenger service at published tariff fares over U. S. Highway 99, between Portland and Seattle, a 25-passenger bus having been obtained particularly for and used in this service. The Commission further found that plaintiff had been on June 1, 1935, engaged as a common carrier

[2] This proviso is commonly known as the "grandfather" clause, and is so designated in the Commission's report, in the District Court's opinion, and in this Statement.

in another and entirely different operation and was so engaged from 1931 to May 29, 1936, when he discontinued or abandoned that operation, which is described in the Commission's findings as follows:

> Applicant has been engaged in the transportation of passengers since 1931. Prior to the institution of his present regular operation between Portland and Seattle on May 29, 1936, he conducted an irregular, so-called any-where-for-hire operation in Oregon with occasional trips to points in Washington. This operation consisted mostly of the transportation of groups of employees from Portland to logging camps in Oregon and Washington. Baseball and basketball teams were also transported. Applicant maintained no terminal facilities. He obtained his business principally through contacts with employment agencies at Portland where men were hired for work at logging camps. While the application alleges that trips were made over the considered route on an average of three times per week, applicant testified that this was only an estimate and that "Sometimes I went into the State of Washington twice a day with two cars; and sometimes I didn't go into the State of Washington for a month." Operation was conducted in Oregon under an any-where-for-hire permit issued by the Public Utilities Commission of Oregon. Two vehicles of 10- or 11-passenger capacity were used. Ap-

plicant did not publish a tariff but based his charges on the mileage involved on each trip.

Upon these facts the Commission found that plaintiff had failed to establish that he was in bona fide operation on June 1, 1935, of the Portland-Seattle service for which the application was made, and, therefore, that he was not entitled under the "grandfather" clause to a certificate authorizing continuance of that operation. The Commission held that "Carriers are entitled, under the 'grandfather' clause, to authority to continue the bona fide 'operations' in which they were engaged on June 1, 1935, and continuously thereafter. Such certificates may not authorize continuance of operations instituted after that date."

As the Portland-Seattle service which plaintiff sought to continue had been established almost a year *after* June 1, 1935, and without a certificate of authority, the Commission found that "applicant's present operations were instituted and have since been conducted in contravention of the provisions of the Act"; and as the irregular "any-where-for-hire" service in which plaintiff was engaged on June 1, 1935, had been abandoned on May 29, 1936, the Commission included in its order, in addition to its denial of the application, a direction that plaintiff "cease and desist, on or before December 10, 1937, from all operation in interstate or foreign

commerce as a common carrier of passengers and their baggage by motor vehicle."

Final hearing was held by the District Court of three judges, one of whom was a Circuit Judge. The court held, in substance (Circuit Judge Haney dissenting):

(1) that the Commission's order was affirmative and not "negative" and that the Court had jurisdiction to review it; (2) that upon the facts found by the Commission issuance of the certificate was mandatory under the "grandfather" clause; (3) that plaintiff's bona fide operation on June 1, 1935, in the "any-where-for-hire" service entitled him under the "grandfather" clause to a certificate authorizing him thereafter to engage in the same or some other and different type of service within the territory in which and over at least one of the highways upon which he had traveled in performing his "any-where-for-hire" service; (4) that, because plaintiff was engaged on June 1, 1935, in the irregular "any-where-for-hire" service, he was entitled to a certificate under the "grandfather" clause, regardless of the fact that he abandoned that service on May 29, 1936, and instituted the new regular scheduled Portland-Seattle service without authorization; (5) that plaintiff "might well be confined to an 'any-where-for-hire' service upon U. S. Highway 99 and compelled to cease his 'fixed termini' (Portland-Seattle) operation, but he was

still operating in interstate commerce over a route and within a territory and could not, therefore, be denied a certificate"; (6) that, although the certificate was claimed solely under the "grandfather" clause of section 206, the Commission did not perform the full "affirmative action" required by the Act, in that, after denying plaintiff a certificate under the "grandfather" clause, the Commission failed to "go further and find whether or not the applicant qualifies under Section 307;"[1] which requires proof of public convenience and necessity for a *proposed* operation; (7) that the Commission was without power upon the facts found to direct that plaintiff cease all operation as an interstate motor carrier.

By the final decree that part of the Commission's order which denies plaintiff's application for the certificate is "suspended until such a time as the Commission either upon further hearing, or upon the record now in its possession, grants to the plaintiff a certificate delimited under the terms of the statute, or denies a certificate in conformity with the statutory requirements," and that part of the order directing plaintiff to cease operating as an interstate motor carrier is "annulled, cancelled, and set aside."

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[1] The sections of the Motor Carrier Act here involved are numbered 206, 207, and 208 in the Statutes at Large, but are numbered, respectively, 306, 307, and 308 in the United States Code.

E. The questions presented are substantial and of great importance both to thousands of motor carriers claiming "grandfather" rights to certificates, and to the Commission in its action already taken upon a large number of applications for certificates under the "grandfather" clause, and in its action yet to be taken upon some forty thousand such applications now pending final disposition. The court's decision in this case amounts to a reversal of the Commission's interpretation and application of the rights of motor carriers under the "grandfather" clause in the disposition already made of a great many applications for certificates under that provision of the Act.

F. The following decisions sustain the jurisdiction of the Supreme Court to entertain an appeal in this case:

United States v. *Pan American Petroleum Corp.*, 304 U. S. 156.

B. & O. R. R. Co. et al. v. *United States*, 304 U. S. 58.

Escanaba & Lake Superior R. R. Co. v. *United States*, 303 U. S. 315.

United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

Youngstown Sheet & Tube Co. v. *United States*, 295 U. S. 476.

G. A copy of the majority opinion of the District Court, the concurring opinion of Judge McColloch,

and the dissenting opinion of Circuit Judge Haney, is appended hereto.

Respectfully submitted.

N. A. TOWNSEND,
Acting Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
CARL C. DONAUGH,
United States Attorney.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
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Counsel, Interstate Commerce Commission.

Service accepted September 6, 1938.
WILLIAM L. HARRISON.
SEPTEMBER 7, 1938.

In the District Court of the United States for the District of Oregon

DAN E. MAHER, DOING BUSINESS AS INTERSTATE BUSSES, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

OPINION, JUNE 16, 1938

JAMES ALGER FEE, *District Judge:*

This is a suit brougth under Title 28, U. S. C. A. Sec. 41 (28) and Sections 43–48 to set aside an order of the Interstate Commerce Commission made October 27, 1937, in a proceeding designated "MC–59620, Dan E. Maher Common Carrier Application." Maher, as a common carrier of passengers and their baggage in interstate commerce over the route of U. S. Highway 99 and within territory contiguous thereto upon June 1, 1935, filed his application on or about January 1, 1936, for a certificate confirming his right under the proviso of Section 206a of the Motor Carriers Act of 1935, 49 U. S. C. A. 306a.[1] The form of the application is

[1]All subsequent section references are to the law as codified in United States Code Annotated.

not before the Court, but it is set up in the complaint and admitted that "petitioner, by application filed on or about the 1st day of January 1936, with said defendant Commerce Commission, sought a certificate of public convenience and necessity, authorizing petitioner to operate as a common carrier by motor vehicle of passengers and their baggage over U. S. Highway #99, between Portland, Oregon, and Seattle, Washington, and intermediate points thereof." It is also alleged and admitted that plaintiff "is a common carrier by motor vehicle, engaged in interstate operations over U. S. Highway #99, between Portland, Oregon, and Seattle, Washington, and through various intermediate points, transporting passengers for the general public for compensation from each of the aforesaid cities to the other, and from various points within each of the states of Washington and Oregon, to points within other of said states, and in this respect petitioner alleges that he was in bona fide operation as a common carrier by motor vehicle between said cities on June 1, 1935, and that by reason of such operation this petitioner is, and was at all times herein mentioned entitled as a matter of right and law, under the provision of Section 206a of the Motor Carrier Act of 1935, known as the 'Grandfather' clause thereof, to have issued to him by the defendant Commerce Commission, a certificate of public convenience and necessity, authorizing such operation." The facts contained in this allegation are admitted by answer.

Upon the filing of said application the matter was referred for hearing to Joint Board No. 45 by the Commission. The Public Utilities Commissioner of Oregon, certain railroads and bus companies were permitted to intervene and oppose the granting of the application. The Commission found that Maher had been since 1931, conducting a quite irregular transportation of passengers in interstate commerce between Oregon and Washington, continuously to the date of the filing of his application and thereafter until May 29, 1936. The Commission noted that the transportation was authorized under an "anywhere-for-hire" license issued by the Public Service Commission of Oregon and apparently recognized by the authorities of Washington. The bona fides of the operation is established by the facts found. But the Commission held that long after Maher had filed his application for a certificate before it he had begun operation on a regular schedule of a passenger service over the same route and within the same territory and thereafter no longer proceeded with transportation on an irregular schedule as he had done before. It was further found that all Maher's operations in interstate commerce were "probably" over a "route", U. S. Highway 99, whether on the one hand the transportation was "anywhere-for-hire" from Portland, Oregon, to Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Noah Bay,

Greenwood, Port Ludlow, and Spokane, all of which points are in the State of Washington and can best be reached from Portland over U. S. Highway 99, or, on the other hand, on regular schedule between Portland, Oregon, and Seattle, Washington as fixed termini, since both these points are on U. S. Highway 99. The Commission findings also show that all Maher's operations in interstate commerce were "within a territory," viz, the territory between Portland, Oregon, and Seattle, Washington, and contiguous to U. S. Highway 99.

The Commission concluded that by instituting a regular route with fixed termini the applicant had abandoned his irregular operations. Based upon this conclusion an order was issued in the following terms:

> Investigation of the matters and things involved in this proceeding having been made, and said division on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:
>
> It is ordered, That said application be, and it is hereby, denied, effective December 10, 1937.
>
> And it is further ordered, That applicant be, and he is hereby, notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle.

This order the plaintiff prays this court to set aside in the present suit. The cause was tried before a statutory court. No evidence was introduced except a copy of the findings of the Commission which are accepted as the facts.

This court has jurisdiction to enjoin, set aside, annul, or suspend in all or in part any order of the Interstate Commerce Commission, Title 28, U. S. C. A., Section 41, Subdivision 28, but the findings of the Commission are conclusive and cannot be assailed "in the absence of the evidence upon which they were made." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282. No court, of course, should review a determination which was exclusively within the scope of the power and the discretion of the Commission, or substitute the judgment of the court as to wisdom of the order. Such matters are beyond the province of this tribunal. In this case, the evidence taken before the Commission was not produced, and cannot be considered, and this court, therefore, makes no attempt to review the record or establish independent conclusions as to its weight or sufficiency.

But the facts are here set up in the Commission's order and may be considered in the determination of the questions of law. The orders of the Commission are final unless (1) beyond the power which it can constitutionally exercise; (2) beyond its statutory right; or (3) based upon mistake of law. *Interstate Commerce Commission* v. *Union Pacific*

Railroad, 222 U. S. 541–547. Thus it may be set aside where the facts are established if "in violation of the constitutional prohibition against taking property without due process of law," or if the Commission acted "so arbitrarily and unjustly as to take action contrary to the facts found by it," or "if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the power." See *Interstate Commerce Commission* v. *Union Pacific Railroad, supra.* "A conclusion which plainly involves, under the undisputed facts, an error of law" may be set aside. *McLean Lumber Co.* v. *United States*, 237 F. 460.

Upon the facts found by the Commission, it is to be determined whether (1) a certificate should have been issued to Maher, (2) whether a cease and desist order should have been promulgated.

As to the issuance of the certificate, the Commission fell into three errors of law; first, because it refused issuance under the terms of the proviso of the section concluding that he had no "regular" route on June 1, 1935; second, in concluding that a change from an "anywhere-for-hire" to a fixed termini operation destroyed Maher's right to a certificate notwithstanding all of his transportation was over the same route and within a definite territory; and third, by failing to consider the application under the terms of section 307.

As to the first point, the Commission confused its functions. It confused the diverse terms upon which the two different types of certificates are to be issued. There was an attempt in its conclusions to import the requirement of "regular routes" and "fixed termini" applicable only to certificates under Section 307 into the language of proviso 306 (a) and to make the failure of the applicant to have a "regular route" and "fixed termini" prior to June 1, 1935, a foundation for the absolute denial of the certificate and of the right to operate in interstate commerce at all.

The statute permits two different forms of applications for certificates relating to the transportation of persons or property for hire in interstate commerce. The first is by one who has been in bona fide operation in interstate commerce for a certificate to continue "over the route or routes within the territory for which application is made", under the proviso of Section 306 (a). The other is an application by any qualified person for a certificate of public necessity and convenience to perform a proposed service as common carrier by motor vehicle, under Section 307. Section 308 refers to this differentiation but establishes uniform provisions for both types of certificates. Under Section 306 (a) if the applicant cannot prove operation under the terms of the proviso, the application is to be treated as if it were tendered under Section 307. Confusion between these two diverse forms

of application and also between the certificate confirming the rights accrued by an operation conducted in the past and the certificate of public necessity and convenience for future operations appears not only in the briefs but also the findings and conclusions of the Commission.

The second type of application is for a certificate by one not previously operating under the conditions prescribed by the act, and relates only to future operations. It is under the terms of the statute not to be issued to common carriers of passengers (1) "over other than a regular route or routes," (2) "and between fixed termini," (3) except for "special or charter operations" and is never to be issued (4) unless the service "is or will be required by the present or future public convenience and necessity." Section 307. The certificate confirming the rights gained by past operations and accepting previous operation as a substitute for a finding of public necessity and convenience, on the other hand, is to be issued (1) upon a finding of bona fide operation before June 1, 1935, (2) continued since that time, (3) "over a route or routes or within the territory for which application is made." Section 306 (a). Congress did not in this section require a limitation to "regular" route or routes or between "fixed termini" nor make an exception as to charter or special operations. Neither was an actual "public convenience and necessity" requisite, since Congress deemed the previous

actual operation guaranteed the necessity and convenience of the public.

By the proviso of Section 306 (a), Congress contemplated the continuance of any service by motor vehicle in interstate transportation, whether regular or irregular, seasonal or continuous, actually requisite or not. The purpose is plain. Congress was protecting the property and business of those previously engaged in bona fide transportation of persons and property by motor vehicle in interstate commerce. The proviso of Section 306 (a) set up a scheme for registration of special carriers without destroying their rights or their business. On the other hand, Section 307 provided definite limitations upon the operations of the persons who may in the future desire to obtain the privilege of conducting such operations.

The conclusion of the Commission makes clear the fallacy:

> We find that applicant has failed to establish that he was in bona fide operation as a common carrier by motor vehicle of passengers and their baggage between Portland, Oreg., and Seattle, Wash., *over a regular route* on June 1, 1935, and that he has so operated since that time.

This conclusion contains a negative pregnant because the facts found are that Maher was in bona fide operation as a common carrier by motor vehicle of passengers and their baggage over "a route,"

U. S. Highway 99, on June 1, 1935. Nowhere in the findings of fact is it suggested that Mayer's operations were not bona fide. It is unquestioned that such operations before May 29, 1936, were not over a "regular" route between Portland, Oregon, and Seattle, Washington. This prerequisite to confirmation of existing rights is that the person who made application "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, *over the route or routes or within the territory* for which application is made and has *so operated* since that time." 306 (a). Bona fide operation over a route or over a number of routes or within a territory is thus the primary essential. The intention to include all types of operation is made clear by the fact that the applicant was not confined to a route or routes but was to be qualified if he operated within a territory. Further, it is indicated that a certificate was not only to be issued for a regular route but also for irregular routes for "common carrier" is defined in this particular as a person who transports persons and passengers "whether over regular or irregular routes." 303 (a) (14). This phrase was used not to make a dichotomy between these types of service, but to mark clearly the all embracing purpose of Congress. The law further goes to the extent of recognizing seasonal service by motor vehicle in interstate commerce. 306 (a). The distinction that the

Commission attempted to draw is made clearer by another finding as follows:

> When applicant instituted regular-route service between Portland and Seattle it appears that he discontinued the so-called anywhere-for-hire operations theretofore conducted.

But both the "anywhere-for-hire" operations which were begun in 1931 and continued at least until the initiation of the service between Portland and Seattle in May 1936, and the operation with "fixed termini" then begun and continuing to date, were "over a route," U. S. Highway 99 between these two points, and "within a territory," viz, that territory reached over U. S. Highway 99 and between Portland and Seattle. Maher made application for this route and this territory according to the pleadings.

Commissioner Lee points out:

> This applicant has been engaged in the interstate transportation of passengers, as a carrier by motor vehicle, since 1931. Under the "grandfather" clause of the Motor Carrier Act, 1935, he is entitled to continue to operate. * * * By the "grandfather" clause, it was sought to protect carriers in their existing operations.

In the second place, the Commission concluded that because the applicant had changed the type of his operation from an "anywhere-for-hire" service, using U. S. Highway 99 in interstate com-

merce, to an operation with the "fixed termini" Portland and Seattle over the same highway, that the operation was not a continuous one.

It is true the act also provides that the operation must have been continued. But the law does not denounce a change of one type of service to another. Apt words could have been used if this were the intention. Undoubtedly, the applicant would be confined to the exact service which he was furnishing on June 1, 1935. However, if one who had been operating a line in May and June of each year prior to June 1, 1935, had thereafter extended his service upon a year around basis, it could not be argued that he abandoned the seasonal service. Similarly, if he had thereafter operated for eleven months and in every month except May, he might have abandoned the month of May and might even be confined to transportation in June, alone, but he could not entirely be denied a certificate. So Maher might well be confined to an "anywhere-for-hire" service upon U. S. Highway 99 and compelled to cease his "fixed termini" operation, but he was still operating in interstate commerce over a route and within a territory and could not, therefore, be denied a certificate. The establishment of a "fixed termini" operation could be deemed an abandonment of a claim for an "anywhere-for-hire" service in the same territory since the act provides:

> Any common carrier by motor vehicle transporting passengers under a certificate

> issued under this chapter may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed. Sec. 208 (c).

Upon the facts, a distinction between a regular and an irregular route vanishes. The Commission found that all Maher's operations in interstate commerce were probably in part over U. S. Highway 99. This highway, then, is established for part of the distance, at least, as a regular route. It will be noticed that a regular schedule is not mentioned in the definition. If it be held that Maher is no longer entitled to operate over other routes than U. S. Highway 99, he certainly never abandoned his right to serve the public upon that road. If, on June 1, 1935. he was performing an "any-where-for-hire" service, it is inconceivable that he forfeited that right by placing his busses on schedule between "fixed termini" on that road so that those persons who wished to go to any point thereon for hire could do so without making special arrangements. In other words, if he be held to have abandoned his rights on other routes, his operation on U. S. Highway 99 after May 29, 1936, was an attempt to increase his service thereon rather than to abandon it. But the fact that the Commission by certificate might only authorize an "any-where-for-hire" service in the territory contiguous to U. S. Highway 99 and falling short of Seattle,

and compel him to cease operations over other highways altogether, did not constitute a justification for its denial of his right to service at all.

The statute gives it sufficient power *by the terms* of the certificate which it should have issued to protect any type of operations, for it may "specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate" and could attach "to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require." Section 308. The Commission in many cases has heertofore exercised the power conferred upon it by granting the certificate applied for and imposing limitations. The cases of *Hibbing, etc., Common Carrier Application,* 1 M. C. C. 540; *George Cassens, etc., Application,* 1 M. C. C. 771; *Slagle Contract Carrier Application,* 2 M. C. C. 127 are illustrative of such action. In these cases the certificate was granted but delimited in terms in accordance with the previous business of the carrier.

The Commission further did not perform its full duty with regard to Maher. The law provides that if any applicant does not qualify as one who was "in bona fide operation as a common carrier

by motor vehicle on June 1, 1935 * * * and has so operated since that time * * *" then the Commission must go further and find whether or not the applicant qualifies under Section 307. The particular language used is contained in Section 306 (a) and reads as follows: "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 307 (a) of this chapter and such certificate shall be issued or denied accordingly." The Commission made no finding as to whether the "proposed service * * * is or will be required by the present or future public convenience and necessity" as required by the latter section. 307 (a). That body apparently entirely disregarded this clause because no reference is made to it in the opinion or in the order. The briefs filed by the counsel for the Commission indicate clearly this attitude for they insist that it was the duty of Maher to file a new application under Section 307.

It is true that the Commission is given the power to fix by regulation the form of application for certificate but it would have no authority to abrogate the section of the statute under discussion by requiring two different applications. The intent of Congress was to permit no operation by an applicant after certificate had been denied, and it was, therefore, intended that all possibility should be exhausted on the one application. No assumption is necessary to arrive at this conclusion, since Congress require affirmative action by the Commission.

The Commission thus acted contrary to the statute in denying a certificate where it failed to make jurisdictional findings of fact.

The Commission, therefore, took action not permitted to it by the law. All the facts required by Congress for the issuance of a certificate under the proviso of 306 (a) were found. The issuance was, therefore, mandatory. The Commission failed to issue a certificate because two erroneous conclusions of law were drawn, first, that an operation in interstate commerce "over a route" and "within a territory" was not entitled to protection when not over a regular route and between fixed termini, and second, that an irregular operation in interstate commerce was abandoned where a regular operation over the same route and within the same territory was carried on. The applicant was further denied rights by the Commission since that body failed to consider his application "in accordance with the procedure provided for in Section 307 (a)."

Based upon these erroneous interpretations, the Commission issued a "cease and desist order." This power was conferred upon that body by the statute under certain circumstances, Sec. 304 (6). But it was not the intention of Congress that when an applicant attempted to have his rights confirmed by a prayer for a certificate, the Commission should be empowered to issue an injunction. "As the Congress itself could not be, so it can not make its agents be, the final judge of its own power under

the Constitution. Congress has no power * * * to prescribe what constitutes due process of law for its ascertainment." *B. & O. Railroad Co.* v. *United States, supra.* Judicial action is required before the Commission could enforce the provisions of the statute designed to prevent operation without a certificate, Sec. 305 (h); *United States* v. *Griffin, Receiver,* No. 63, February 28, 1938, United States Supreme Court. This action in issuing a "cease and desist" order was unquestionably affirmative. Maher was commanded to cease an operation which the statute gave him the right to continue. Further, not only the "cease and desist" order but also the denial of certificate was affirmative.

The operation is not illegal under the statute while the application for a certificate is pending. Once certificate is denied by a valid order the operation becomes a crime. This is one of the distinguishing features between the case at bar and *Lehigh Valley Railroad Co.* v. *United States,* 243 U. S. 412, 414. There the risk arose from the statute itself. Here there is no risk or criminality until a certificate has been denied by valid order.

In *Powell* v. *United States,* 300 U. S. 276, 285, the Commission struck out a tariff filed by the railroad whereby it included rates relating to a station which it was contended was not upon its line. The court says, in holding the order affirmative in effect "the order * * * confines the Seaboard's service within the junction switching limits, denies leave to

that carrier to furnish, and prevents it from furnishing transportation to and from Fort Benning." in the instance case, by refusing to grant the certificate upon the facts found, the Commission would deny leave to plaintiff to furnish and would prevent it from furnishing transportation over U. S. Highway 99 in accordance with its previous service. This case is stronger than the Powell case, for here the plaintiff was in actual operation legally before the statute took effect. A railroad has no legal right to operate an extension without a certificate based on a finding of public necessity and convenience. In the absence of the certificate, here the act of operation becomes a crime and is punishable. See *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, 391–2.

The suspension of the order denying the certificate, then, would not leave the situation unchanged but would allow the plaintiff to continue in operation as he has done in the past. By annulment or suspension of the order, the plaintiff would have protection of those rights which Congress sought to confirm. *Alton Railroad Co.* v. *United States*, 257 U. S. 229, 240. On the other hand, immediately upon the order becoming final, the plaintiff will be subjected to damage which is "substantial, immediate, and irreparable." *Alton Railroad Co.* v. *United States, supra.* The business of plaintiff, which although subject to regulation, was heretofore carried over the highways of Oregon and

Washington with the consent of the states involved (compare *Buck* v. *United States,* 267 U. S. 302) is of substantial right and "the unnecessary and uncompensated taking or destruction of any property legally acquired and legally held" is unauthorized. *Alton Railroad Co.* v. *United States, supra; Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; cited in *B. & O. Railroad Co.* v. *United States,* 298 U. S. 349. Even a temporary cessation of operation by plaintiff would cause loss of patronage and might destroy his business. The whole order in this case, therefore, is affirmative in its effect and displays the intention of the Commission to cut off the rights which the Congress itself granted to the plaintiff. Therefore, the court must go behind the assigned grounds and determine the validity of the order independently. *Wallower* v. *United States,* 32 F. (2d) 524.

Inquiry as to what action the court should take under these circumstances must be made next. The order, to cease and desist from all operation in interstate commerce, at least, must be set aside. Since the statute gives the court the power to annul an order in whole or in part, it makes no difference whether severable or not, it may be annulled. It is said to create an anomalous situation, if the "cease and desist" order be set aside while the provisions of law prevent the plaintiff from operating after the refusal of the certificate. See *Chesapeake & Ohio Railway Co.* v. *United States,* 35 F.

(2d) 769, 773. But such a situation cannot arise, since the paragraph denying the certificate is likewise affirmative in effect, and action should be taken in regard to it, also. It is said that this court, at least, has no power to compel the Commission to issue the certificate either by mandatory decree (*Piedmont & Northern Railway Co.* v. *United States,* 280 U. S. 469) nor can the court itself issue the certificate, because the various limitations upon the terms of such a certificate are committed to the discretion of the Commission under Section 308. See *The Chicago Junction Case,* 264 U. S. 258, 264. The answer to this proposition is found in *Alton Railroad Co.* v. *United States, supra,* where it is said: "The court is not asked to prescribe reasonable divisions, or to direct that they be prescribed by the Commission. The court is asked to find that the Commission denied the Alton a constitutional right as a result of acting upon erroneous principles of law, and therefore to enjoin that part of the order."

The court has the power to suspend an order of the Commission. Cf. *Atlanta, B. & C. R. Co.* v. *United States,* 37 F. (2d) 401; *United States* v. *Atlanta, B. & C. R. Co.,* 282 U. S. 522, 527. If this paragraph, denying the certificate, were suspended, the application would still be pending, and the plaintiff would have the right to operate until the Commission granted or refused the application under the terms of the statute which provides

"pending the determination of any such application, the continuance of such operation shall be lawful." Sec. 306 (a). The illegality of the operation, which would be occasioned by the denial of the certificate, would not then exist until further action was taken. The Commission could thereupon either, upon further hearing or upon the record now in its possession grant to plaintiff a certificate delimited under the terms of the statute or deny the certificate upon findings which would conform with the statutory requirements. Until such action is taken, the terms of paragraph one of the order, denying certificate, are suspended. Paragraph two of the order, commanding Maher to cease and desist from further operations in interstate commerce is set aside.

CLAUDE MCCOLLOCH, *District Judge*, specially concurring:

I desire to express my special approval of that part of Judge Fee's opinion to the effect that whatever rights a carrier had as of June 1, 1935, should be respected and declared by the Interstate Commerce Commission, and certificate issued for the same. It would be a harsh rule to deny an applicant all rights simply because he claimed more or even a different right than he was entitled to. The extension of the jurisdiction of the Interstate Commerce Commission into the field of motor transportation is new and advanced legislation, and the Act should be construed to avoid injustice to the many

small operators engaged in making their living in this field at the time the law went into effect.

HANEY, *Circuit Judge,* dissenting:

I dissent.

First. Defendants challenge the jurisdiction of this court. Under the statute, our jurisdiction extends to "cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission." 28 U. S. C. A. 41 (28). The words "any order" as there used, mean "any affirmative order." *Procter & Gamble* v. *United States,* 225 U. S. 282, 293, 294; *United States* v. *Griffin,* — U. S. —, February 28, 1938. That part of the order which denies the application for a certificate of public convenience and necessity is, I believe, an order which is negative in substance and form, over which we have no jurisdiction. *Piedmont & Nor. Ry.* v. *United States,* 280 U. S. 469.

No contention is here made that we have jurisdiction under 205 (h) of the act. (See Coordinator Eastman's memorandum to the Senate Interstate Commerce Committee suggesting amendments to Senate Bill 1639, which is the act in question.)

Under the express words of the statute, however, our jurisdiction extends to part of an order. Petitioner contends that the cease and desist part of the order is affirmative.

I believe a cease and desist order is ordinarily subject to review by this court. *Tap Line cases*, 234 U. S. 1.

Defendants contend, however, that the order is not separable because the action of the court would result in an anomalous situation, and rely on *Chesapeake & Ohio Ry. Co.* v. *United States* (D. C. W. Va.), 35 F. (2d) 769, affirmed, 283 U. S. 35. That case does not hold that in such situation the order is not reviewable, and in fact is not in point, because there the statute made "no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction," 283 U. S. 35, 42. Here the Commission had no such latitude and discretion, for it was required to issue the certificate on proof of specified facts.

Since the order was a command to petitioner, I believe it is an affirmative order, and within our jurisdiction.

Second. The extent of our reviewing powers is stated in *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 547. So far as is here material, the order in question is final, unless "based upon a mistake of law" under that case. There is no dispute as to the facts. Petitioner was on June 1, 1935, in operation on irregular routes within the territory for which application was made. The Commission construed the act to mean

that petitioner was not entitled to a certificate covering a route between fixed termini, unless he was operating on a regular route on and since June 1, 1935, and defendants contend that such construction was correct.

I believe the Commission has not misconstrued the act. The "carrier" referred to in 306 (a) is defined in 303 (a) (14) to include those which operate "over regular or irregular routes." The fact that petitioner, on June 1, 1935, was operating over an irregular route, does not prevent issuance of a certificate, because of that statute. Under 306 (a) petitioner is entitled to a certificate "if (he) * * * was in bona fide operation * * * on June 1, 1935, over the route or within the territory for which application is made and has so operated since that time * * *." Petitioner, although he was in bona fide operation on June 1, 1935, over an *irregular* route, has not "so operated since that time" because he commenced operations over a *regular* route on May 29, 1936, and has continued In other words, I believe the statute means that if a carrier was operating over a regular route on June 1, 1935, he must have so continued after that date in order to obtain a certificate under 306 (a); and that if a carrier was operating over an irregular route on June 1, 1935, he must have so continued after that date to obtain such a certificate.

Third. By 28 U. S. C. A. 306 (a), the Commission must issue a certificate upon proof of certain facts

If such facts are not proven, then "the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this chapter and such certificate shall be issued or denied accordingly." Under the latter section proof of different facts is required before a certificate shall be issued. There is here no allegation in the bill that there was proof of such facts. There were no findings made by the Commission of the required facts. The evidence is not before us. Under such circumstances, we should presume that the Commission performed its duties and therefore refused to grant a certificate under 307 (a) because there was no showing of the required facts. I do not believe we should declare that the Commission should have determined the application under 307 (a) when we do not know whether there was any evidence before it to consider.

Fourth. Did the Commission have power to make the cease and desist order? I think that it had such power. Under 306 (a) such a carrier may not operate without a certificate of public convenience and necessity. Violation of that section is made a crime 322 (a). Express power to make the order is given by 304 (6) which provides:

> It shall be the duty of the Commission * * * (6) to administer, execute, and enforce all other provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regula-

tions, and procedure for such administration * * *.

For these reasons I think the bill should be dismissed.

Filed September 7, 1938.

G. W. MARSH, *Clerk.*

By E. S. KENYON, *Deputy.*

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 432

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

DAN E. MAHER, DOING BUSINESS AS INTERSTATE BUSSES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The majority and dissenting opinions of the specially constituted District Court (R. 12–22) are reported in 23 F. Supp. 810. The report of the Interstate Commerce Commisison (R. 6–9) is reported in *Dan E. Maher Common Carrier Application*, 3 M. C. C. 479.

JURISDICTION

The final decree of the District Court was entered July 9, 1938 (R. 29). Petition for appeal

was filed September 7, 1938, and was allowed the same day (R. 33). Jurisdiction is conferred on this Court by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 210, 219 (U. S. C., Title 28, Secs. 45 and 47a, Sup. III); Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (U. S. C., Title 28, Sec. 345), and by the Motor Carrier Act, 1935, Sec. 205 (h), c. 498, 49 Stat. 543, (U. S. C., Sup. I, Title 49, Sec. 305 (h)).

QUESTIONS PRESENTED

1. Is the appellee entitled to a certificate of public convenience and necessity under the provisions of Section 206 (a) of the Motor Carrier Act, 1935 (c. 498, 49 Stat. 543; 49 U. S. C., Sec. 306 (a))?

2. Assuming that the appellee is not entitled to such a certificate under the provisions of Section 206 (a) of the Act, should the Interstate Commerce Commission have considered his application under the provisions of Section 207 (a) of the Act and determined whether public convenience and necessity required the issuance of a certificate to the appellee?

3. Did the specially constituted district court have jurisdiction to review the order of the Commission denying the application of the appellee for a certificate of public convenience and necessity and directing that appellee be "notified and required" to cease and desist from operating in interstate commerce as a common carrier?

STATUTE INVOLVED

The provisions of the Motor Carrier Act, 1935 (c. 498, 49 Stat. 543; 49 U. S. C. 8), primarily involved, are found in Sec. 206 (a) of the Act which provides, in part, as follows:

> No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * *, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That * * * if any such carrier * * * was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect * * *. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such ap-

plication the continuance of such operation shall be lawful.

The pertinent provisions of the Motor Carrier Act, 1935, are set forth in Appendix A to this brief, *infra*, pages 56–66.[1]

STATEMENT

This is a direct appeal by the United States and the Interstate Commerce Commission from a final decree of the United States District Court for the District of Oregon, entered July 9, 1938 (R. 29–30), which suspends in part, and in part annuls, cancels, and sets aside an order of the Interstate Commerce Commission, Division 5, entered on October 27, 1937 (R. 9–10). The Commission's order denied appellee's application under Section 206 (a) of the Motor Carrier Act, 1935, for a certificate of public convenience and necessity, and further ordered that he be "notified and required" to cease and desist from all operation in interstate commerce as a common carrier by motor vehicle.

1. PROCEEDINGS BEFORE THE COMMISSION

By application filed with the Commission on January 24, 1936, appellee sought a certificate of public convenience and necessity authorizing op-

[1] The statute will be referred to in the brief as "the Act" and the designation of the sections thereof will follow the numeration found in the statute as enacted (Act of August 9, 1935, c. 498, 49 Stat. 543, Secs. 201–227) rather than the numeration adopted in the Code (U. S. C. Sup. I, Title 49, Sections 301–327).

eration as a common carrier by motor vehicle of passengers and their baggage between Portland, Oregon, and Seattle, Washington, over U. S. Highway 99, and intermediate points thereon. On November 12, 1936; a hearing was held before a Joint Board and evidence taken.[2] The Public Utilities Commission of Oregon, the Oregon Bus Association, the Motor Coach Association of Washington, the North Coast Transportation Company, and certain rail lines appeared in opposition to the application (R. 7). The Joint Board's recommended order denying the application was stayed by order of the Commission April 24, 1937 (R. 6), and the questions involved were thereafter argued and submitted to the Commission, Division 5, for determination.

On October 27, 1937, the Commission handed down a report setting forth its findings of fact and conclusions (R. 6–9), and entered an order denying

[2] In order to use the experience and knowledge of local conditions possessed by State commissions, but to do so within the framework of a system permitting centralization of administrative control, Congress conferred jurisdiction over many matters arising under the Act to "Joint Boards" composed of one member from each State involved, nominated by the regulatory commission of the State from its own membership or otherwise, or by the Governor. Their duties, powers, and jurisdiction are the same as those of members and examiners of the Commission, and any order recommended by a Joint Board is subject to the same rules as an order recommended by a member or an examiner of the Commission. Motor Carrier Act, 1935, c. 498, 49 Stat. 543, Sec. 205 (U. S. C., Sup. I, Title 49, Sec. 305).

appellee's application, the denial to be effective December 10, 1937, and further ordering that the appellee be "notified and required" to cease and desist on or before December 10, 1937, from all operation in interstate commerce as a common carrier (R. 9–10). The effective date of the order was thereafter postponed by the Commission to January 10, 1938 (R. 10).

2. THE COMMISSION'S FINDINGS OF FACT

The pertinent findings of fact made by the Commission and included in its report may be summarized as follows:

Appellee's operations on June 1, 1935, and prior to May 29, 1936. The Commission found that from 1931 until May 29, 1936, *and on June 1, 1935,* appellee had been conducting an irregular, anywhere-for-hire operation in Oregon with occasional trips to points in Washington (R. 7). Operations in Oregon were conducted under an anywhere-for-hire permit issued by the Public Utilities Commission of Oregon, and appellee kept detailed records of his operations in Oregon for the purpose of making reports to the authorities of that State. Appellee kept no records of his operations in Washington for the reason that he made no reports to the authorities of that State (R. 8). In instances where trips were made to points in Washington, his records would show the destination point as Vancouver or Vancouver Bridge, the point at which the State of Washington was entered (R. 8).

The Commission's report and the record before this Court are silent as to whether or not he actually had authority from the State of Washington to operate therein.

During this period, appellee's operation consisted largely of the transportation of groups of employees from Portland to logging camps in Oregon and Washington. He obtained business principally through employment agencies at Portland where men were hired for work at the camps. He also transported baseball and basketball teams (R. 7). Trips were made at various times between 1933 and 1936 to the following points in the State of Washington: Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane (R. 8).

Although appellee's application alleged (R. 8) that on June 1, 1935, he was conducting regular-route operations on U. S. Highway 99 between Portland and Seattle and that he was serving all intermediate points, the Commission found that in 1935 only eleven, and between January and April in 1936 only six trips were made to points in Washington, the specific destinations not being revealed (R. 8). The Commission further found (R. 8) that there was no evidence of service at any time to most of the intermediate points on U. S. Highway 99. Many of the Washington points mentioned above are on other highways. For example, Cathlamet

and Deep River are on U. S. Highway 830; Raymond and Aberdeen are on U. S. Highway 101; Neah Bay is in the extreme northwestern corner of the State a considerable distance from any point on U. S. Highway 99 between Portland and Seattle; and Spokane is in the extreme eastern part of the State many miles from U. S. Highway 99 (R. 8). A map showing the location of the points in the State of Washington to which the appellee made trips at various times is included in this brief as Appendix B, *infra* page 61. The Commission also found *that prior to May 29, 1936, and since about 1933, appellee had made no trips to Seattle* and that there was no evidence that prior to May 29, 1936, he had carried passengers on return trips to Portland (R. 8). The Commission's report states that "U. S. Highway 99 probably was used for at least part of the distance on most, if not all, of applicant's trips to Washington" (R. 9).

In the conduct of the operation above described appellee used two vehicles of 10- or 11-passenger capacity. He published no tariff but based his charges on the mileage involved on each trip. He maintained no terminal facilities (R. 7, 8).

Appellee's operation on and after May 29, 1936. On May 29, 1936, appellee discontinued the anywhere-for-hire operations which he had theretofore, and on June 1, 1935, conducted as described above (R. 8) and inaugurated the operation which he was conducting at the time of the hearing be-

fore the Joint Board on November 12, 1936. Using a 25-passenger bus, purchased particularly for the new operation, and an auxiliary 10-passenger vehicle, he began a regular daily scheduled service between Portland and Seattle, as fixed termini, over U. S. Highway 99, serving intermediate points. Fares were based on a published tariff. Operations were carried on under the trade name "Interstate Busses," a trade name not theretofore used (R. 7).

The Commission concluded that the service instituted on May 29, 1936, was a new and different service from that previously conducted by appellee, and was instituted and had been conducted in contravention of the provisions of the Act, and that the evidence wholly failed to sustain appellee's claim that he was entitled to continue such service by virtue of his operation as conducted on June 1, 1935 (R. 9).[1]

3. PROCEEDINGS IN THE COURT BELOW

On December 15, 1937, appellee filed a bill of complaint in the court below, alleging that the evidence before the Commission showed that peti-

[1] Commissioner Lee concurred in part, agreeing with the majority that appellee's "regular route operation between Portland and Seattle does not come within the purview of the 'grandfather' clause." Nevertheless, he was of the opinion that a certificate should be issued authorizing continuance of the operation appellee "was conducting when the act was passed" (R. 9).

tioner was in *bona fide* operation as a common carrier by motor vehicles on June 1, 1935, over the routes and within the territory for which application had been made, and praying that the Commission's order be set aside, annulled, and enjoined on the ground that there was no evidence to support it and that the Commission had exceeded its statutory powers and had misinterpreted and misapplied the Motor Carrier Act, 1935 (R. 1-3). The bill of complaint also prayed that a three-judge district court be convened pursuant to the provisions of the Urgent Deficiencies Act.

The bill of complaint did not allege that public convenience and necessity required the continuance of the operation in which the appellee was engaged on and after May 29, 1936, that the appellee had offered any evidence before the Commission on the question of whether public convenience and necessity required the continuation of that operation, or that the Commission erred by not making a finding with respect to public convenience and necessity.

A district court of three judges was convened under the provisions of the Urgent Deficiencies Act and the cause was heard by that court on February 11, 1938. No evidence was introduced in the court below. The Commission's report and order were attached as exhibits to the defendants' answers, and the court below accepted the findings of fact contained therein as correct (R. 14). Cf. *Mississippi*

Valley Barge Line Co. v. *United States*, 292 U. S. 282.[4]

On June 16, 1938, the specially constituted District Court rendered an opinion in which the majority of the court held that it had jurisdiction to review the Commission's order, that so much of the order as denied the appellee's application should be suspended, and that the provision of the order directing that the appellee be notified and required to cease and desist from further operations should be set aside (R. 12–22). The majority of the court were apparently of the opinion (1) that although the applicant was not entitled to a certificate authorizing the service which he performed on and after May 29, 1936, he was entitled to a certificate which authorized the service which he was performing on and before June 1, 1935; and (2) that the appellee was denied his legal rights by the Commission because having determined that he was not entitled to a certificate under Section 206 (a) of the Act, the Commission failed to consider his application under Section 207 (a) of the Act and determine whether public convenience and necessity required

[4] In its findings of fact and conclusions of law (R. 24) the lower court states that "the parties hereto have stipulated that the Court should consider the evidence in this matter as found by the Interstate Commerce Commission" (R. 24–26). The record, however, fails to show any such express stipulation. The Commission's report in its entirety was attached as an exhibit to the defendants' answers (R. 6, 11) and defendants' case was submitted on the pleadings as a whole.

the continuance of the operation in which he was engaged.

Circuit Judge Haney filed a dissenting opinion (R. 22–24) in which he held that the portion of the Commission's order denying the application was negative in substance and form and that the court had no jurisdiction over it, but that the cease and desist order was affirmative and within the court's jurisdiction; that the Commission had properly construed the Motor Carrier Act, 1935, and had rightly held that appellee had abandoned the operations which he was conducting on June 1, 1935; that appellee was not entitled to a certificate; that the question of proof of public convenience and necessity under Section 207 (a) was not before the court; that the Commission had power to issue the cease and desist order; and that the bill of complaint should be dismissed.

On July 9, 1938, the District Court entered a decree suspending that part of the Commission's order which denied the application "until such time as the Commission either upon further hearing, or upon the record now in its possession, grants to the plaintiff a certificate delimited under the terms of the statute, or denies a certificate in conformity with the statutory requirements"; and annulling, cancelling, and setting aside that portion of the order requiring that appellee be notified and required to cease and desist from further operation in interstate commerce (R. 29–30).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In entering the decree suspending that part of the Commission's order which denies appellee's application for a certificate.

2. In entering the decree annulling and setting aside that part of the Commission's order which requires appellee to cease and desist from all operation in interstate commerce.

3. In holding that, upon the facts found and stated in the Commission's report, Section 206 of the Motor Carrier Act, 1935, made it mandatory upon the Commission to issue to the appellee a certificate of public convenience and necessity.

4. In holding that appellee's operation of the anywhere-for-hire service on June 1, 1935, and thereafter until he abandoned it on May 29, 1936, entitled him under the "grandfather" proviso of said Section 206, to a certificate authorizing the continuance of the Portland-Seattle operation, instituted May 29, 1936, over U. S. Highway 99, for which appellee's application was made to the Commission.

5. In holding that appellee's operation of the anywhere-for-hire service on June 1, 1935, and thereafter until he discontinued it on May 29, 1936, entitled him under said "grandfather" proviso to a certificate authorizing either the re-establishment of all or a part of the abandoned anywhere-for-hire

operation or the continuance of the new Portland-Seattle operation.

6. In holding that the Commission, upon the facts found by it, acted contrary to law in issuing its order denying appellee's application for a certificate and directing that he cease from all operations as an interstate motor carrier.

7. In holding that the Commission was without power to deny appellee's application for a certificate on the ground that the service for which the application was made was not the service conducted by appellee on June 1, 1935.

8. In holding that the Commission was without power to deny appellee's application for a certificate on the ground that he had on May 29, 1936, discontinued the service in which he was engaged on June 1, 1935.

9. In holding that appellee's abandonment of anywhere-for-hire service on May 29, 1936, and his institution on that date of the daily scheduled Portland-Seattle service did not destroy his right under the "grandfather" clause to a certificate authorizing operation of any service over U. S. Highway 99.

10. In holding upon the facts found by the Commission that plaintiff "might well be confined to an 'anywhere-for-hire' service upon U. S. Highway 99 and compelled to cease his 'fixed termini' operation, but he was still operating in interstate commerce over a route and within a territory and could not, therefore, be denied a certificate."

11. In holding that: "The law provides that if any applicant does not qualify as one who was 'in bona fide operation as a common carrier by motor vehicle on June 1, 1935, * * * and has so operated since that time' then the Commission must go further, and find whether or not the applicant qualifies under Section 307."

12. In holding, despite the fact that plaintiff's application was made and the right to the certificate claimed and supported solely under the "grandfather" clause of Section 206, that the Commission acted contrary to law and failed to perform its full duty in merely denying the application as made and in failing to make findings of fact "as to whether the 'proposed service' is or will be required by the present or future public convenience and necessity as required by the latter section, 307 (a)."

13. In holding that the Commission's order was affirmative and not negative, and that it had jurisdiction to review the order.

14. In failing and refusing to hold that the Commission's order is valid and lawful in all respects and in refusing to enter a decree dismissing the bill of complaint.

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission lawfully refused to issue appellee a certificate under the proviso of Section 206 (a). It lawfully refused to

issue a certificate authorizing operation as a common carrier of passengers over U. S. Highway 99 between Portland and Seattle, fixed termini and intermediate points, as applied for, because appellee was not so engaged on June 1, 1935. On June 1, 1935, appellee was engaged in special or charter, anywhere-for-hire operations over irregular routes and between no fixed termini. Prior to the enactment of the Motor Carrier Act there was a well-established distinction in the motor carrier industry between such an operation and the regular route, fixed-termini passenger service for which appellee applied. Congress expressly recognized the distinction in the Act. It was not the purpose of Congress to permit an anywhere-for-hire, irregular route carrier, engaged in special or charter operations, to establish regular route, fixed-termini passenger service, without further proof of public convenience and necessity, merely because its motor vehicles continued physical movement over the same route or routes, or in the same territory. An opposite construction of the Act will defeat the express policies of Congress.

It was not incumbent upon the Commission to issue appellee a certificate under the proviso to Section 206 (a) authorizing a re-establishment of any part of the anywhere-for-hire, special or charter operations conducted prior to May 29, 1936, and on June 1, 1935. Appellee on May 29, 1936, discontinued his anywhere-for-hire transportation of spe-

cial groups over irregular routes and thereby voluntarily abandoned his right to a certificate for such service under the proviso. To receive a certificate under the statute an applicant must show not only that it was in *bona fide* operation on June 1, 1935, but that it "has so operated since that time." Section 206 (a). Appellee did not apply for a certificate authorizing operation of an anywhere-for-hire, special or charter service over U. S. Highway 99, and it nowhere appears of record that he desires such a certificate or would be willing to perform such service.

II

The Commission's order is not unlawful because it failed to consider and determine whether the "proposed service * * * is or will be required by the present or future public convenience and necessity" in accordance with the procedure provided for in Section 207 (a) of the Act. The District Court misconstrued the proviso of Section 206 (a). That section does not require the Commission to consider under Section 207 (a) an application which it has denied under Section 206 (a). The construction adopted below would permit continued lawful operation without certificate under exaggerated claims as to operation on June 1, 1935, until public convenience and necessity might be determined, and is contrary to the spirit and purpose of the Act. The construction below imputes to Congress an ignorance of the tremendous adminis-

trative task inherent in the enactment of the statute. Appellee did not apply for a certificate under Section 207 (a) of the Act in the form prescribed by the Commission, nor does the bill of complaint allege that the present or future public convenience and necessity requires his regular operation between Portland and Seattle or that evidence was presented or claim made to the Commission with respect to such an issue.

III

The portion of the Commission's order denying the appellee's application was negative in form and substance and did not direct the appellee to perform or to cease to perform any act; it is, therefore, not the kind of order which the court below could review under the Urgent Deficiencies Act. The denial of the certificate did not subject the appellee to risks or penalties; any risks or penalties to which the appellee may be subject arise not from the order but from the act. That part of the Commission's order which directed that the appellee be notified and required to cease and desist from operation was merely an affirmation of the self-operating provisions of the statute. The appellee's operations without a certificate were illegal under the statute. This provision of the order did not create or increase that illegality. Whether this portion of the Commission's order is reviewable under the Urgent Deficiencies Act depends not upon its form but upon the character of the administrative action

involved. That action was negative in effect, and hence, this provision of the order is not reviewable. Denial of jurisdiction under the Urgent Deficiencies Act does not preclude all judicial review; the appellee has other remedies if the action of the Commission is illegal.

ARGUMENT

I

THE APPELLEE IS NOT ENTITLED TO A CERTIFICATE UNDER SECTION 206 (a) OF THE ACT

Section 206 (a) of the Act provides in effect that no common carrier by motor vehicle, subject to the provisions of the Act, shall engage in any interstate operation unless there is in force with respect to such a carrier a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the operation. The Section contains a proviso which declares that if a carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time" the Commission shall issue the certificate without requiring further proof that public convenience and necessity will be served by the carrier's operation. In *McDonald* v. *Thompson,* No. 55, October Term, 1938, this Court said that this proviso should "be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms."

The appellee is not entitled to a certificate of public convenience and necessity under the proviso to Section 206 (a). He is not entitled to a certificate authorizing him to operate as a common carrier over U. S. Highway 99 between Portland and Seattle, as fixed termini, and intermediate points, because he was not engaged in such an operation on June 1, 1935. He is not entitled to a certificate authorizing him to continue the "anywhere-for-hire" service in which he was engaged on and before June 1, 1935, because by reason of his abandonment of that operation on May 29, 1936, he has failed to continue the operation in which he was engaged on June 1, 1935, as the terms of the proviso require.

A. THE COMMISSION LAWFULLY REFUSED TO ISSUE A CERTIFICATE UNDER SECTION 206 (A) AUTHORIZING APPELLEE TO OPERATE AS A COMMON CARRIER OF PASSENGERS OVER U. S. HIGHWAY 99, AS A REGULAR ROUTE, BETWEEN PORTLAND AND SEATTLE, AS FIXED TERMINI, AND INTERMEDIATE POINTS, AS APPLIED FOR, BECAUSE APPELLEE WAS NOT SO ENGAGED ON JUNE 1, 1935

Appellee applied to the Commission for a certificate under the "grandfather" proviso of Section 206 (a) of the Motor Carrier Act [5] authorizing him to operate as a common carrier by motor vehicle of passengers and their baggage over U. S. Highway 99, between Portland, Oregon, and Seattle, Washington, and intermediate points thereon (R. 2, 6). If he had been able to show that on June 1, 1935, he was in *bona fide* operation as such a carrier and

[5] Appendix A, *infra*, page 56.

had so operated since that time, it would have been the duty of the Commission to issue a certificate authorizing him to so operate "without requiring further proof that public convenience and necessity will be served by such operation." Appellee failed to make this showing.

The undisputed facts show that on June 1, 1935, appellee was not engaged in the transportation of passengers over any regular route or between any fixed termini, and certainly not over U. S. Highway 99, and between Portland and Seattle, and intermediate points. He had not made a trip to Seattle since about 1933 (R. 8). He had never made a trip to most of the intermediate points on U. S. Highway 99 (R. 8), nor had he shown that passengers had ever been transported on return trips to Portland (R. 8). He had made trips to only fourteen points in the State of Washington and many of those points are not located on or near U. S. Highway 99 (R. 8). (See the map in Appendix B.) His trips even to those points were very infrequent. The appellee testified, "Sometimes I didn't go into the State of Washington for a month" (R. 8). In the year 1935 he made only eleven trips to Washington points, the particular points being undisclosed by his evidence (R. 8). The appellee did not publish a tariff but based his charges on the mileage involved on each trip (R. 8).

Indeed, it is debatable whether appellee on and before June 1, 1935, undertook "to transport for

the general public" in accordance with the definition of a "common carrier by motor vehicle" found in Section 203 (a) (14).[6] His service was narrowly restricted to special groups such as employees seeking group transportation from Portland to logging camps in Washington, and baseball and basketball teams (R. 7). The Commission's findings do not disclose whether he held himself out to serve such special groups indiscriminately or whether he transported such groups as a "contract carrier by motor vehicle" pursuant to "special and individual contracts or agreements."[7]

On May 29, 1936, the appellee instituted a service totally different in kind from the service which he had theretofore offered. On that date he instituted a regular daily scheduled bus service over

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[6] This definition follows:

> The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies * * *.

[7] The term "contract carrier by motor vehicle" is defined by Section 203 (a) (15) as follows:

> The term "contract carrier by motor vehicle" means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

. S. Highway 99, between Portland and Seattle
nd intermediate points. The service was for the
eneral public and was conducted on a published
ariff fare basis. The appellee used new equipment
nd operated under the trade name "Interstate
usses" which he had not theretofore used.

The appellee contended below that the proviso to
ection 206 (a) does not authorize the Commission
o make any distinction between regular and irreg-
lar routes, regular and irregular service, or any-
here-for-hire and fixed-termini service; that by
eason of the fact that his physical operations were
rried on, at least in part, over U. S. Highway 99
n or before June 1, 1935, the proviso to Section
06 (a) conferred upon him an absolute right to a
rtificate of public necessity authorizing him to
ntinue operations; and that his fixed termini
aily scheduled operation between Portland and
eattle over U. S. Highway 99 was a proper exer-
se of the right so conferred.

The appellants submit that appellee's construc-
on of the Section 206 (a) involves an unwar-
nted extension of the proviso contained therein
nd is in direct conflict with the view of this Court
at the proviso should be "held to extend only
carriers plainly within its terms." *McDonald* v.
hompson, No. 55, October Term, 1938, decided
ecember 5, 1938. Furthermore, this construction
the statute assumes that Congress legislated, if
t in ignorance, at least in disregard of economic

conditions and practices in the industry which it was regulating. Such an assumption is without basis in fact. The Motor Carrier Act, 1935, was enacted after more than a decade of study and after hearings by the Congress on many proposals and bills for the regulation of the industry. Extensive and careful regulation of the industry had been advocated by the Interstate Commerce Commission,[8] and by the Federal Co-ordinator of Transportation[9] after exhaustive studies. The Motor Carrier Act does not represent, as did the first Act to Regulate Commerce enacted in 1887, a cautious and experimental approach to the regulation of a carrier industry. It is an ambitious, comprehensive, and detailed scheme for the control of the motor carrier industry in the public interest.

For many years before the Act was passed there was a clearly recognized distinction in the motor-bus industry between special and charter anywhere-for-hire operations over irregular routes on the one hand and regular route bus operations between fixed termini on the other.[10] In the enactment of

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[8] The Commission had made two extensive investigations of the motor transport industry, *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685 (April 10, 1927) and *Coordination of Motor Transportation*, 182 I. C. C. 263 (April 6, 1932).

[9] *Regulation of Transportation Agencies*, Sen. Doc. 152, 73d Cong., 2d Sess. 1934.

[10] "* * * passenger service operators may be classified as common carriers over regular routes, and carriers engaged in miscellaneous services, such as school, sight-seeing, and charter party." *Coordination of Motor Transportation*,

e Motor Carrier Act, and specifically in establish-
g the exemption of the "grandfather" proviso,
ongress could not have intended to ignore this dis-
nction in transportation service. Proof that it
id not is found in the use of the phrase "over the
oute or routes or *within the territory*" in the pro-
iso of Section 206 (a); in the terms of the proviso
Section 207 that "no such certificate shall be is-
ued to any common carrier of passengers by motor
ehicle for operations over other than a regular
oute or routes, and between fixed termini, except
s such carriers may be authorized to engage in
pecial or charter operations"; in the duty con-
erred upon the Commission by Section 208 (a) to
specify the service to be rendered and the routes
ver which, the fixed termini, if any between which,
nd the intermediate and off-route points, if any,
t which, and in case of operations not over speci-
ed routes or fixed termini, the territory within
hich, the motor carrier is authorized to operate";
nd in the power conferred upon the Commission
Section 204 (c) to "establish such just and rea-
nable classification * * * groups of carriers
cluded in the term 'common carrier by motor ve-
cle,' * * * as the special nature of the serv-
es performed by such carriers * * * shall re-
ire; and such just and reasonable rules, regula-

2 I. C. C. 263, 274. See also *Coordination of Motor Transportation*, Sen. Doc. No. 43, 72d Cong., 1st Sess., pp. 35, and *Regulation of Transportation Agencies*, Sen. c. No. 152, 73d Cong., 2d Sess., pp. 176, 191–192.

tions, and requirements * * * to be observed by the carriers * * * so classified or grouped, as the Commission deems necessary or desirable in the public interest." The terms "regular routes," "irregular routes," "within the territory," "fixed termini," and "special or chartered operation," are words of art familiar to the industry, and had for years prior to the enactment of the Motor Carrier Act been employed in the drafting of state legislation and of the regulations of state commissions to distinguish between the type of service such as that which appellee was furnishing on June 1, 1935, and that which he instituted on May 29, 1936, and for which he sought a certificate.[11]

The difference between these two types of transportation service, long established and well known in the industry and undoubtedly familiar to Congress, is clearly recognized by the language of Section 206 (a). To obtain a certificate under the proviso of that Section a carrier must have been "in bona fide operation as a common carrier by motor vehicle on June 1, 1935"; furthermore, he must have "so operated since that time." If these and the other conditions of the proviso are satisfied, the

[11] By 1933 common carriers of passengers by motor vehicle over "regular routes" were being regulated in 47 states and the District of Columbia. In 34 states and the District of Columbia there was regulation of common carriers of passengers over "irregular routes." *Regulation of Transportation Agencies*, Sen. Doc. No. 152, 73d Cong., 2d Sess., p. 173.

ommission is required to issue to him a certificate, ithout further proof, that public convenience and ecessity will be served "by such operation." The *peration* which the Commission is thus directed to uthorize is the operation in which the carrier was ngaged on June 1, 1935, not some new and different peration initiated subsequent to June 1, 1935, and erving an economic function radically different om the function served by a prior operation.

That this is the correct construction of the statuory language follows from a consideration of the olicy which prompted its enactment. Doubtless he primary reason for conferring a statutory right o a certificate upon a carrier who on and after une 1, 1935, had operated as a common carrier was ast the mere existence and continuation of the peration, without more, raises a presumption that he operation serves public convenience and necesity." But if this presumption is to be indulged, it

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[22] Cf. *Coordination of Motor Transportation*, Senate ocument No. 43, 72nd Congress, 1st Session (ordered to be inted January 6, 1932). Report by Leo J. Flynn to the terstate Commerce Commission (page 99):

> Motor-carrier operators who have pioneered, taken the hazards of the development period, and have established routes and built up traffic should be given just and fair consideration. The fact of continuous bona fide operation for a reasonable period prior to the enactment of regulatory legislation and at the time the application for a certificate is made should be deemed prima facie evidence as to the public convenience and necessity of the operation.

ge 115):

> The law should provide that the fact that an applicant for a certificate of public convenience and

must apply to the service performed on June 1, 1935, and not to a totally different kind of operation. As to the latter operation which was not in existence on June 1, 1935, there can be no presumption that it serves public convenience and necessity and it cannot be assumed that Congress intended to confer an absolute right upon the carrier to conduct that operation.

The adoption of the construction of Section 206 (a) for which appellee contends would seriously impede the accomplishment of the statutory policy. The obvious purpose of requiring a certificate as a condition precedent to operation as a carrier by motor vehicle is to prevent and restrain the kind of unnecessary duplication of facilities and wasteful competition which would prevent the development of an adequate, economical, and efficient service by motor carriers.[13] If the proviso to Section 206 (a)

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necessity was in bona fide operation as a common carrier over the route or between the termini described in the application for a reasonable length of time prior to the enactment of regulatory legislation and continuously to the time application is made has so been in operation should be considered prima facie evidence of the public convenience and necessity of such operation. If satisfactory showing is made that such applicant is able adequately to perform the service required, a certificate should be issued to the applicant without further proceedings.

[13] The Commission, in *Black Hills Transportation Company Common Carrier Application*, 2 M. C. C. 391, 395 (decided July 14, 1937), has construed the legislative purpose as follows:

The most liberal meaning that can be placed on the language used by Congress is that the only operations coming within the scope of the exception are the only

is to be construed so as to confer upon any person who on and before June 1, 1935, performed an intermittent, irregular, anywhere-for-hire service within a certain territory or over part of certain routes an absolute and vested right to establish a regular scheduled service between fixed termini anywhere on those routes or within that territory, irrespective of any considerations of public convenience and necessity, the power of the Commission to deal with the specific problems at which Section 206 (a) is directed will be substantially weakened. For example, a carrier who on June 1, 1935, was conducting sightseeing or other special or charter operations over various irregular routes in several states could lawfully institute regular, fixed-termini, daily scheduled bus service over every route in that territory, even though each one of those routes was and is now being furnished by one or more other carriers with a regular service which satisfied all of the possible requirements of public convenience and necessity. In such circumstances much of the protection which the Section is designed to give against wasteful and unnecessary competition would be illusory.

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operations over such route or routes or within such territory as the transportation services, and other services incidental thereto, rendered in or with good faith, honestly, openly, etc., on June 1, 1935, and since that time, reasonably establish to have been both within the *limits of the transportation business* in which the applicant was actually engaged on that date and within the *limits of the transportation business* in which the applicant has actually engaged since that date. [Italics ours.]

B. THE COMMISSION IS NOT REQUIRED TO ISSUE APPELLEE A CERTIFICATE UNDER SECTION 206 (a) AUTHORIZING A RE-ESTABLISHMENT OF ANY PART OF THE ANYWHERE-FOR-HIRE SERVICE WHICH HE CONDUCTED PRIOR TO MAY 29, 1936, AND ON AND BEFORE JUNE 1, 1935

The court below took the view that although the appellee was not entitled to a certificate authorizing him to carry on the regular scheduled fixed-termini operation in which he is now engaged, the Commission was under a duty to issue to him a certificate authorizing him to re-establish the anywhere-for-hire service which he performed on June 1, 1935.[14] The appellants submit that the court below erred in reaching this conclusion.

1. Appellee did not continue the service in which he was engaged on June 1, 1935, as Section 206 (a) requires

In order to receive a certificate under the "grandfather" proviso without proof of public convenience and necessity, an applicant must show more than that it was in bona fide operation on June 1, 1935. Such an applicant must show that it *"has so operated since that time."*[15] It was not the

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[14] District Judge Fee, writing for the majority of the court, said (R. 17):

> Undoubtedly, the applicant would be confined to the exact service which he was furnishing on June 1, 1935 * * *. So Maher might well be confined to an "anywhere-for-hire" service upon U. S. Highway 99 and compelled to cease his "fixed-termini" operation but he was still operating in interstate commerce over a route and within a territory and could not, therefore, be denied a certificate.

[15] "Except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control." (Section 206 (a), Appendix A, *infra*, p. 56.) There

Congressional purpose to perpetuate a carrier's right to operate as it did on June 1, 1935, unless the carrier had continued thereafter without "interruption" to serve the public by such operation. The mortality rate in the industry prior to the enactment of the Act was notoriously high. The requirement of continuous operation was in furtherance of the policy of Congress, as expressed in Section 202 (a) of the Act, "to promote adequate, economical, and efficient service by motor carriers."

The Commission found that appellee, on May 29, 1936, discontinued the anywhere-for-hire service which he had theretofore been conducting and which he was conducting on June 1, 1935 (R. 8). Assuming that appellee was a common carrier on June 1, 1935, his operations on that date, had they been continued, would have entitled him at most to a certificate authorizing him to engage only in special or charter anywhere-for-hire operations over the irregular routes in the territory which he was serving on June 1, 1935. The Commission did not issue a certificate to the appellee authorizing this kind of an operation because he had not complied with the mandate of the statute that the operation in which he was engaged on June 1, 1935, be continued without interruption. Had appellee not abandoned his June 1, 1935, operation, as he did on

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is no contention here that appellee's discontinuance, on May 29, 1936, of the operations in which he was engaged on June 1, 1935, was beyond his control. The discontinuance was voluntary and deliberate.

May 29, 1936, it would have been the duty of the Commission to determine whether or not on June 1, 1935, he was a common carrier of passengers engaging in special or charter anywhere-for-hire operations over irregular routes, and to have issued or denied him a certificate limited accordingly. The Commission has expressly recognized its right and duty to issue certificates authorizing such operations under the proviso of Section 206 (a) as well as under Section 207 (a).[16]

[16] In *Blue and Grey Sightseeing Tours, Incorporated, Common Carrier Application*, 8 M. C. C. 124 (decided June 23, 1938) the Commission granted a "grandfather" certificate authorizing the applicant to continue round trip pleasure and sight-seeing tours from Washington to Arlington National Cemetery, Annapolis, Mount Vernon and New Market and return and special round trip tours from Washington to various historic places in Delaware, Maryland, New Jersey, Pennsylvania, and Virginia. In *Peninsula Transit Corporation Common Carrier Application*, 1 M. C. C. 440 (decided January 26, 1937), the Commission construed Section 208 (c) of the Act which provides that "any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed." Applicant had "grandfather" rights to transport passengers over certain regular routes and between certain fixed termini, and sought a certificate to so operate and in addition to conduct special or charter parties to any place. Special or chartered party operations constituted a small proportion of applicant's business, averaging perhaps one special trip per day throughout the year and for the most part had been confined to movements between points on applicant's own routes with occasional trips to other points and in other states. Protestants contended that "if

Whatever the situation may have been with respect to the operations of the appellee on or before June 1, 1935, he has not "so operated since that time" so as to be entitled to a certificate under the provisions of Section 206 (a). It is no answer to assert that the statute does not forbid a mere change in the incidents, or extent or scope of, the service which was performed on June 1, 1935. The change which took place in the appellee's service on May 29, 1936, was more than a change in incidents, and more than a change in extent or scope

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charter service is to be specifically authorized in the certificate granted, the authorization should restrict the service to include only the origins, destinations, routes, and frequencies operated on and prior to June 1, 1935. The Commission, giving effect to Section 208 (c), held that no certificate was necessary to authorize applicant to conduct special or charter party operations to any place, that this right was "incidental to the holding of a certificate for the transportation of passengers between fixed te[illegible]ini over a regular route or routes;" but that it could "by special or general rules or regulations impose appropriate limitations as to origin territory." Accordingly, it found that applicant could "transport to any place within the United States, special or chartered parties which originate in the territory served by its routes," the limitation on origin territory being deemed "a special rule prescribed for the purpose of this proceeding and subject to such modification as may be appropriate under any rules or regulations which we may hereafter prescribe." The Commission further said: "Only those common carriers of passengers who are engaged, or propose to engage, exclusively, in the transportation of special or chartered parties are required to obtain a certificate specially authorizing such operations (see proviso of Section 207 (a)). As to such carriers we may issue a certificate only upon the submission of the requisite proof under Section

of service. It was a complete change in the character of the service. The economic function which appellant performed after May 29, 1936, was different from the function which he had performed prior thereto. The kind of competition offered by the appellee to other carriers on the same routes and the same territory was radically different in character after May 29, 1936.

Any construction of Section 206 (a) which ignored the significance of a change of this extent and character would be contrary to the spirit and purpose of the statutory requirement of continuous operation. Such a construction would substitute a bare requirement that motor vehicles

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206 (a) or 207 (a) of the Act, and the scope of the operation must be stated in the certificate." In *Red Star Sightseeing Line, Incorporated, Common Carrier Application*, 1 M. C. C. 521 (decided February 27, 1937) the applicant applied under Section 207 (a) for a certificate authorizing round-trip sightseeing and pleasure tours over irregular routes in a certain territory. It had not operated nor did it seek to operate a regular bus service over any regular routes or between any fixed termini. The Commission said (p. 525): "We have power under Sections 206 and 207 to issue a certificate authorizing a carrier to engage exclusively in the special or charter operation or both, for the transportation of passengers and their baggage over irregular routes, and we conclude that the proposed sightseeing and pleasure-tour operations of applicant are special operations within the meaning of that term as used in the proviso to Section 207 set forth above. Obviously, however, a certificate authorizing applicant to conduct such operations would not carry with it any right to transport in interstate or foreign commerce to any place special or chartered parties under Section 208 (c)."

physically move over the same route or routes in the same territory, for the continuity of economic function and of competitive effect, which are the real circumstances to which the statute looks. The anomalous effect of such a construction as applied to other situations is apparent. Assume that an applicant, who on June 1, 1935, was engaged in transporting sight-seeing parties over irregular routes from the District of Columbia to points in surrounding states, thereafter abandoned such operations, and established over one of its former routes, for example from Washington, D. C., to Baltimore, a regular, daily scheduled passenger operation in competition with established bus lines. The construction adopted by the court below would preserve the applicant's right under Section 206 (a) to resume sight-seeing operations from Washington, D. C., to Baltimore and intermediate points, upon the ultimate denial of a certificate to engage in the regular bus service. Assume the opposite case. A regular bus operator between Washington, D. C., and Baltimore on June 1, 1935, subsequently abandons this regular service and engages in sight-seeing operations or the transportation of chartered parties from Washington, D. C., to points in adjacent states, including Baltimore. Upon the discontinuance of its regular bus service and pending the determination of its application, other carriers may have secured certificates of public convenience and necessity to furnish the transportation services which the applicant had voluntarily refused to con-

tinue. Upon denial of a certificate for the latter service, could it resume regular bus operations from Washington, D. C., to Baltimore without further proof of public convenience and necessity?

Appellee's failure to meet the statutory requirement of continuity of operation cannot be excused on the ground that the change of operation on May 29, 1936, was not in fact a substitution of one type of service for another, but was merely an increase of service or a merger of one service with another. This is not a case of a mere increase of service, and not a case of a lesser service being merged with a greater. Appellee did not on and after May 29, 1936, continue over U. S. Highway 99, with more regularity and more facilities, the same service which he had theretofore conducted. On June 1, 1935, appellee was a sporadic, anywhere-for-hire operator over irregular routes. Sometimes he did not go into Washington for a month (R. 8). In the year 1935 he made only eleven trips to undisclosed points in Washington (R. 8). His service to the public was narrowly restricted. So far as the Commission's findings disclose, he confined himself to employees seeking transportation as a group from Portland to logging camps in the State of Washinton, and to occasional basketball and baseball teams (R. 7). He had not been to Seattle since 1933 (R. 8).

There was no mere merger of operations, no bare increase of service to the public, when on May 29, 1936, he discontinued the sporadic transportation

f these special groups to indiscriminate points in he State of Washington, and began, instead, to perate daily on a fixed schedule between fixed ter- nini, Portland and Seattle and intermediate points n U. S. Highway 99; to serve regularly intermedi- te points which he had never served before (R. 8); o transport passengers in return over the same oute as he had not theretofore done (R. 8); to hold imself out, not to transport special groups of per- ons but to transport the individual members of he public indiscriminately on a published tariff asis.

Appellee did not apply for a certificate authorizing the operation of an anywhere-for-hire, special or charter service over U. S. Highway 99 and it nowhere appears of record that he desires such a certificate or would be willing to perform such a service

It is not incumbent upon the Commission to issue certificate of public convenience and necessity au- horizing a type of service for which application as not been made. This is certainly the case in he absence of a claim therefor on the part of the arrier either at the hearing or by a petition for a re- earing, after entry of the order denying the appli- ation. Otherwise, a certificate might issue to au- horize operations in which the applicant has no esire or intention to engage. Appellee did not ap- ly to the Commission for a certificate authorizing he transportation of special groups of passengers ver U. S. Highway 99, or any part thereof, as he as doing on June 1, 1935, and nowhere of record

does it appear that he claimed or desired such a certificate, or that if it were granted, that he would in fact perform such a service.[17]

II

THE COMMISSION WAS NOT OBLIGATED TO CONSIDER APPELLEE'S APPLICATION UNDER SECTION 207 (a) OF THE ACT AND TO DETERMINE WHETHER THE PROPOSED SERVICE IS OR WILL BE REQUIRED BY THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY

A. THE PROVISIONS OF SECTION 206 (A) OF THE ACT DID NOT REQUIRE THE COMMISSION TO CONSIDER APPELLEE'S APPLICATION UNDER SECTION 207 (A)

Although the appellee in his bill of complaint did not allege that the Commission had erred by failing to consider his application under Section 207 (a) or that he had presented any evidence to the Commission showing that public convenience and necessity would be served by the continuation of his op-

[17] Presumably since the date of the hearing before the Joint Board, November 12, 1936, until the present time, appellee, under claim of right, has continued his regular fixed-termini, daily scheduled operation between Portland and Seattle. The court below, while apparently recognizing that appellee should properly be confined under the "grandfather" clause to "the exact service which he was furnishing on June 1, 1935" (Opinion, R. 17), and only to such part thereof as had not thereafter been abandoned (Opinion, R. 18), nevertheless held that the Commission should have further proceeded to determine whether public convenience and necessity required the service for which appellee contended. Its decree wholly set aside and annulled the Commission's cease and desist order. Nor did the court seek to confine appellee, pending the further determination of the case, to the operations to which in the court's opinion he was entitled under the "grandfather" clause. Thus appellee was left free to continue the questioned operations.

eration, or that, in fact, the continuation of those operations would serve public interest and necessity, the court below held that the Commission erred, because once having determined that the appellee was not entitled to a certificate under the provisions of Section 206 (a), it did not consider his application under Section 207 (a) (R. 18–19).

The lower court based this conclusion on the sentence immediately following the first proviso to Section 206 (a) which reads as follows: "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 207 (a) of this part and such certificate shall be issued or denied accordingly." This construction of the language of Section 206 (a) links the "otherwise" clause to the wrong antecedent. That clause becomes applicable, not upon the failure of the applicant to show *bona fide* operation on June 1, 1935, but upon the failure of the applicant to file its application within one hundred and twenty days after the effective date of the section. Its antecedent is the conditional clause "if application for such certificate was made to the Commission * * * within one hundred and twenty days after October 1, 1935."

The generally applicable rule established by Section 206 (a) is that no common carrier by motor vehicle shall operate in interstate commerce without holding a certificate from the Commission. To this general rule, however, Congress by the proviso established an exception for those carriers who (1)

were in *bona fide* operation on June 1, 1935, and (2) have so operated since that time.

A carrier of this class, notwithstanding it holds no certificate, may continue its existing operation pending the determination of its application for a certificate. It is the duty of the Commission to issue a certificate to a carrier of this class without requiring further proof of public convenience and necessity and without further proceedings, *upon the express condition,* however, that application therefor be made within one hundred and twenty days after the effective date of the section. "*Otherwise* (that is to say, if application therefor be not made within the one hundred and twenty day period), the application for such certificate shall be decided in accordance with the procedure provided for in Section 207 (a). In short, an applicant belonging to the class of carriers excepted from the general rule, who files in time and an applicant who does not are differentiated so far as concerns the character of proof required; the first applicant needs no proof other than its operations, the second requires the sort of proof required for a new operation.[18] But they are alike in the privilege of law-

[18] It should be noted that in *Butcher Contract Carrier Application*, 1 M. C. C. 485, 486–487 (decided February 15, 1937) the Commission, in construing the clause of Section 209 (a), applicable to contract carriers, which is substantially identical with Section 206. (a), held that operation pending determination of an application not filed within the statutory period was lawful. The Commission said:

> This interpretation of the statute commends itself to us not only as justified in law but as evincing a sound policy. It must have been obvious to the Con-

al operation pending the determination of the pplication.

The effect of the lower court's construction of the atute is that an applicant who claims under Sec- on 206 (a) operating rights over a route or routes, r in a territory, to which it is in fact not entitled, ay nevertheless require the Commission to deter- ine whether the "proposed service * * * is r will be required by the present or future public onvenience and necessity," and prior to and pend- g such determination engage in operations. This onstruction imputes to Congress an intention to ncourage indiscriminate expansion of motor car- ier operation prior to determination by the Com- ission that such expansion is required by the resent or future public convenience and necessity. t would tend to encourage exaggerated claims un- er Section 206 (a), and would afford to a carrier aking such claims the right to engage in new com- etitive operations without restraint until ulti-

gress that many operators, for one reason or another, would fail to apply for certificates within 120 days after the effective date of the act. Many of such operators were known to be men of limited experience in business and with Government regulation. The whole policy evidenced in the "grandfather" clause indicates that the Congress did not intend to penalize operators who failed to file within a specified date, beyond requiring proof from them which was dispensed with by those who filed in time. It is in conformity with the declared policy to protect the interest of the public by authorizing the continuance of a transportation system which had been built over a substantial period of time rather than virtually to order its cessation.

mately the question of public convenience and necessity was determined. Such a result cannot be reconciled with the purpose of Congress as expressed in Section 202 (a) to "foster sound economic conditions in such transportation and among such carriers in the public interest," to "prohibit unfair and destructive competitive practices," "to improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers."

The anomalous effect which would follow an adoption of the lower court's construction is well illustrated by the result in the instant case. More than two years ago, appellee inaugurated a regular route daily scheduled fixed termini passenger service between Portland and Seattle. The court below concedes that he was not entitled to do so by virtue of his operations on June 1, 1935 (R. 17, 18). Yet it is held that the Commission must determine whether "the present or future public convenience and necessity" requires the operation, and that pending such determination appellee may lawfully continue. If it is ultimately determined that public convenience and necessity did not require the operation, other carriers serving the same route and territory will have been subjected to competition contrary to the public interest.[19]

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[19] The record does not disclose appellee's specific competitors, but that they exist may be safely presumed from the list of protestants who appeared in opposition to his application (R. 7).

By February 12, 1936, 80,925 applications under he "grandfather" provisos of Sections 206 (a) nd 209 (a) were filed before the Commission; ,647 such applications were filed after February 2, 1936; and by November 1, 1938, 6,792 applica- ons for authority to institute new operations had een filed, a total of 93,364 applications. By No- ember 1, 1938, 20,617 applications had been ap- roved, 42,670 had been denied, dismissed, or with- rawn, leaving 30,077 pending applications.[20]

From these figures, it is apparent that more than 0% of the total number of applications under the roviso to Sections 206 (a) and 209 (a) were based pon erroneous claims as to operation on the tatutory date. Doubtless many of the applications pproved were denied in part because of exag- erated claims. Yet the holding of the court below mputes to the Congress an intention that in all f these cases of refusal, it was incumbent upon he Commission to proceed further and decide hether the present or future public convenience nd necessity required the operation as claimed.

APPELLEE DID NOT APPLY FOR A CERTIFICATE UNDER SECTION 207 (a) AND HIS BILL OF COMPLAINT DOES NOT ALLEGE THAT THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY REQUIRES HIS REGULAR OPERATION BETWEEN PORTLAND AND SEATTLE OR THAT HE MADE ANY CLAIM OR PRESENTED ANY EVIDENCE WITH RESPECT TO THIS ISSUE BEFORE THE COMMISSION

Appellee's claim to a certificate was expressly ased upon alleged rights arising by virtue of his

[20] See 52d Annual Report of the Interstate Commerce ommission, November 1, 1938, page 88.

operations on and before June 1, 1935. He did not apply to the Commission for a determination of whether the present or future public convenience and necessity otherwise required the claimed operation. The form of his application is not of record, but the substance of the claim made in his application is ascertainable from the bill of complaint (R. 2) and from the Commission's report (R. 6). Section 206 (b) of the Act expressly provides that "application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require." The Section 206 (a) proviso expressly provides that a certificate may issue thereunder only "if application for such certificate is made to the Commission as provided in paragraph (b) of this section." The Commission had issued regulations for the filing of applications under Sections 206 (a) and 207 (a), prescribing distinct forms differing as to the allegations of fact to be verified and as to proof of service on interested parties.[21] The Commission's report shows that ap-

[21] Form B. M. C. 2, prescribed by order of the Commission dated October 8, 1935, was "to be used ONLY by common carriers engaged in the transportation of passengers in interstate or foreign commerce in June 1, 1935 * * * and continuously thereafter." It called for verified allegations as to the "grandfather" operation, and the only proof of service called for was that a copy of the application had been filed "with the Board, or Governor, if there is no

pellee filed application under Section 206 (a) (R. 6). While the decisions of the Commission show that it has consistently refused to ignore substantive rights or *bona fide* claims merely because of technical defects in the form or allegations of application under the Act,[22] it nowhere appears of

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Board, of each State within which operations * * * are conducted." Form B. M. C. 9, proscribed by order of the Commission dated October 28, 1935, was "for the use of an applicant who 'desires to commence a new common carrier operation.'" It required that the applicant set forth "the facts and circumstances upon which applicant relies to establish that the service covered by this application is or will be required by the present or future public convenience and necessity." It required proof of service not only upon the State Boards, or Governors, as required by Form B. M. C. 2, but also upon "all motor carriers and all carriers by rail and water, known to applicant, with whose service the operations described in this application are or will be directly competitive."

[22] Thus, in *Tri-State Transit Company of Louisiana, Incorporated, Common Carrier Application*, 1 M. C. C. 215 (November 2, 1936), the Commission permitted an amendment to a "grandfather" application so that, as to one of the routes applied for, it might be treated as one for an extension of operations. In *Bowles Common Carrier Application*, 1 M. C. C. 589 (March 13, 1937) the Commission said (page 590): "* * * we are of opinion that it would be unnecessarily harsh, even assuming that applicant erred in respect to his former status, to grant the prayer of protestants that the application be denied * * *. Equity would seem to demand, rather, that this application be treated as one to institute a new common-carrier operation and not as one to continue a common-carrier operation 'instituted before Section 206 of the Act became effective,' and we shall so treat it. We feel that by such treatment all parties will have been accorded substantial justice, since

record here that appellee ever sought a determination that the present or future public convenience required the claimed operation. So far as the record discloses, appellee adduced no evidence on the issue. His bill of complaint does not allege either that such evidence was submitted or that it could have been. The bill of complaint does not allege as an affirmative fact that the present or future public convenience requires the operation, nor does it complain on the ground that the Commission failed to make a finding with respect thereto. At the hearing in the court below appellee did not attack the Commission's order for failure to make such a determination. In these circumstances no basis exists for attacking the Commission's order because the Commission failed to make a finding on an issue which the record discloses was never submitted to it.

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applicant will not thereby be relieved of the burden of proving public convenience and necessity." In *Motor Convoy, Incorporated, Contract Carrier Application*, 2 M. C. C. 197 (June 15, 1937), application under the "grandfather" proviso was treated as one for new operations, where it appeared that the parties had "fully presented their evidence as to this issue." However, issuance of a permit was "withheld for 30 days after service of the report in order that any protestant or other interested party, who may be taken by surprise, may have opportunity to petition for rehearing or reconsideration under our rules. By proceeding in this manner, unnecessary further hearing may be avoided without prejudice to the rights of any one" (page 203). See also, *Jaax Common Carrier Application*, 1 M. C. C. 597, 599 (March 18, 1937); *Michael Common Carrier Application*, 3 M. C. C. 617, 619–621 (December 2, 1937).

III

THE DISTRICT COURT HAD NO JJURISDICTION UNDER THE URGENT DEFICIENCIES ACT TO REVIEW THE ORDER OF THE INTERSTATE COMMERCE COMMISSION

The operative provisions of the order entered by the Interstate Commerce Commission follow (R. 9–10):

> It is ordered that said application be, and it is hereby, denied, effective December 10, 1937.
>
> And it is further ordered that applica. be, and he is hereby, notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle.

Under the provisions of the Urgent Deficiencies Act, c. 32, 38 Stat. 208, 219–220, 28 U. S. C. 47, the jurisdiction of a three judge District Court extends only to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

The first paragraph of the Commission's order, which denies the appellee's application for a certificate of convenience and necessity, is clearly negative in form and substance and, under the decisions of this Court is not reviewable by a three-judge court convened pursuant to the provisions of the Urgent Deficiencies Act.[23] *Piedmont & Nor.*

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[23] Section 205 (h) of the Motor Carriers Act provides in part as follows:

Ry. v. *United States*, 280 U. S. 469; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412; and see *Procter & Gamble* v. *United States*, 225 U. S. 302; *Shannahan* v. *United States*, 303 U. S. 596; *United States* v. *Griffin*, 303 U. S. 226.

That part of the Commission's order which denied the application for a certificate does not direct the appellee to perform any act; it is not the kind of order which the Commission could itself enforce against the appellee, nor does it impose any penalties upon the appellee or, by itself, subject the appellee to the risk of criminal prosecution. The denial of the certificate although in form an order is, in fact, nothing more than a determination that the petitioner had failed to establish facts which would bring him within the scope of the proviso to Section 206 (a). Once the Commission has determined, in the manner authorized by the Act, that the petitioner does not fall within the statutory classification, the provisions of the statute which

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* * * where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under the Urgent Deficiency Appropriations Act, October 22, 1913, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

This provision has no application to the instant case. The Commission here did not base its order on any supposed lack of power or jurisdiction. Nor did the appellee in his bill of complaint pray for mandatory relief.

prohibit and penalize operations without a certificate come into effect. However, the risks to which the appellee then becomes subject are not imposed by the Commission's order as such, but by the provisions of the Act. Cf. *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412, 414.[24] *Piedmont & Nor. Ry.* v. *United States*, 280 U. S. 469, 476–477.

It is significant, furthermore, that a decree annulling, setting aside, or suspending the Commission's order denying a certificate will not in fact afford the appellee any real protection against the risks which he seeks to avoid. Section 206 (a) prohibits operations without a certificate of public convenience and necessity. The appellee now has no certificate. If in fact the appellee does not fall within the class of carriers defined by Section

[24] The court below appears to have taken the view that the order denying the application for a certificate, considered by itself, imposed certain obligations and penalties on the appellee, because as long as the application was pending the appellee would have the legal right to operate without fear of incurring penalties. This is not a correct construction of Section 206 (a). The provisions of that Section permit lawful operation without a certificate pending application by a carrier who was in *bona fide* operation on June 1, 1935, and has so operated since that time. It does not extend this privilege to a carrier who had not, in fact, so operated, merely because his application is pending. To construe the section otherwise would be to permit a carrier who was not in *bona fide* operation on June 1, 1935, or who had not continued such operation, to escape the general prohibition against operating without a certificate and the statutory penalties provided for its violation by the device of claiming non-existing rights.

206 (a), he is subject to all the risks imposed upon him by this prohibition and the other provisions of the Act, and these risks flow from the Act and not from the order. The only effective and final relief which the three-judge court could give to protect the appellee in fact against these risks would be either to issue a mandatory injunction compelling the Commission to issue to the petitioner a certificate of public convenience and necessity, or to hand down a declaratory judgment that the appellee was entitled to such a certificate. That a three-judge District Court convened under the provisions of the Urgent Deficiencies Act has no authority to grant such relief, is established beyond doubt. *Chicago Junction Case,* 264 U. S. 258, 264; *Piedmont & Nor. Ry.* v. *United States,* 280 U. S. 469, 477.

It is true that the court below attempted to give the appellee a kind of indirect affirmative relief by suspending that part of the order which denied a certificate "until such time as the Commission, either upon further hearing, or upon the record now in its possession, grants to this plaintiff a certificate delimited under the terms of the statute, or denies a certificate in conformity with the statutory requirements * * *." This part of the decree of the court below does not, however, direct the Commission to issue a certificate to appellee, nor does it purport to confer an absolute right upon the appellee to a certificate. There is no command in the decree for the Commission to obey or

disobey. The court below has expressed its opinion as to the significance of the facts before the Commission and as to the applicable law, but this amounts to nothing more than a declaratory judgment—a kind of relief which appellee did not seek, and which the three-judge court had no jurisdiction to give. The court below apparently believed that the effect of this decree was to revive the application of appellee which had theretofore been denied and thus to give to him the measure of protection which follows from the provision of the statute which permits a carrier who falls within the terms of Section 206 (a) to operate pending the determination of an application filed with the Commission. Assuming that the effect of the lower court's decree is to revive the application of the appellee, the fact remains that the protection which is afforded to him by the pendency of that application is neither absolute nor unlimited. He still runs the risk of criminal penalties fixed by the Act if, in fact, he is not one of the class of carriers covered by Section 206 (a). And there can be no doubt of the right of the United States in a proceeding brougnt to impose the criminal penalties provided for in the Act to assert and prove that the appellee does not fall within that class of carriers.

Even if the provision of the order denying appellant a certificate is regarded as fixing his status under the provisions of the Motor Carrier Act and thus fixing upon him certain obligations imposed

by the Act, it is, nevertheless, not reviewable by the court below. The determination of a status or similar matter is "not action subject to review under the Urgent Deficiencies Act, even if disregard of the determination may subject the carrier to criminal prosecution." *Shannahan* v. *United States*, 303 U. S. 596, 602. *Cf. Lehigh Valley R. Co. v. United States*, 243 U. S. 412.

The provision of the Commission's order denying the application for a certificate being negative in form and substance when considered by itself, the question remains whether the second provision of the Commission's order which directs that the appellee be "notified and required" to cease and desist from operating as a common carrier is reviewable by a three-judge District Court, and if it is, whether that fact brings the entire order of the Commission within the jurisdiction of the court. This provision of the order, in fact adds nothing to the provisions of the statute or to the risks imposed thereby. The duty of the appellee to cease and desist from further operation is not governed or established by any part of the Commission's order. The provision of the order notifying and requiring appellee to cease and desist must necessarily be based upon the illegality of appellee's present operations from their inception, and that illegality arises neither by reason of the order denying the appellee a certificate nor by reason of the order requiring him to cease and desist. The illegality arises by reason of the fact that the appellee does

not fall within the terms of the proviso to Section 206 (a), and no part of the order of the Commission can subtract from, or increase, that illegality. Viewed in this light, the cease and desist portion of the order is no more than an affirmation of self-operative provisions of the statute which had rendered appellee's operations illegal from their inception. The purpose and effect of this portion of the order, under these circumstances, is no more than to advise the appellee of his present violation and to admonish him against its continuation. Furthermore, the decree of the court below annulling, cancelling, and setting aside this portion of the Commission's order affords the appellee no final protection against the penalties prescribed by the Act; if in fact he does not belong in the class of carriers defined by Section 206 (a), he is subject to those penalties irrespective of the Commission's order.

The fact that the second paragraph of the Commission's order takes the form of notifying and requiring the appellee to cease and desist is not decisive as to the character of the Commission's action. That character can properly be determined in the end only by an analysis of the effect of the Commission's action. It can hardly be supposed, for example, that in *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412, the court would have held that the order was reviewable if it had not merely denied the petition of the Lehigh Valley Transportation Company but had also added a

paragraph requiring the railroad company to abandon or to surrender its ownership in the common carrier by water there involved. In *Shannahan* v. *United States*, 303 U. S. 596, the Supreme Court held that a determination by the Interstate Commerce Commission that a railway was not "a street interurban or suburban electric railway" within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act was not reviewable by a three-judge court even though in that case the Commission's order not only found that the carrier was ineligible under the exemption, but added that it was "therefore subject to the provisions of the Act." The appellants submit, therefore, that whatever view may be taken of the form of the second paragraph of the Commission's order, it is negative in substance, and not properly subject to review by the court below.

Denial of jurisdiction under the Urgent Deficiencies Act does not preclude all judicial review. *United States* v. *Griffin*, 303 U. S. 226. By the terms of the proviso to Section 206 (a) a positive duty is imposed upon the Commission. It is not provided that upon proof of "grandfather" operation a carrier is "entitled to a certificate." It is provided that if the required facts exist, the Commission "shall issue such certificate." Where, upon the evidence introduced before the Commission, its duty to issue such a certificate is "beyond peradventure clear" (*Kansas City Union Station Case*, 294 U. S. 50, 60) the remedy, in case of fail-

ure to comply with the duty, would be by way of mandamus.[23] Cf. *United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission*, 252 U. S. 178. Pending determination of such mandamus proceeding, the applicant could doubtless secure protection from unlawful interference with its operations by resort to equitable injunction against the bringing of criminal actions (Cf. *Shields* v. *Utah Idaho Central R. R. Co.*, No. 28, October Term, 1938; 59 S. Ct. 160), or by resort to other equitable relief.

CONCLUSION

It is respectfully submitted that the decree of the lower court should be reversed.

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JANUARY 1939.

[23] Cf. *Federal Rules of Civil Procedure*, Rule 81 (b).

APPENDIX A

The pertinent provisions of the Motor Carrier Act, 1935, c. 498, 49 Stat. 543 (U. S. C. Sup. I, Title 49, Chapter 8) read as follows:

SEC. 202.[1] (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

* * * * *

SEC. 203. (a) As used in this part—

* * * * *

[1] The designation of the sections of the Act will follow the numeration found in the statute as enacted (Act of August 9, 1935, c. 498, 49 Stat. 543, Secs. 201–227) rather than the numeration adopted in the Code (U. S. C. Sup. I, Title 29, Secs. 301–327).

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

(15) The term "contract carrier by motor vehicle" means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

SEC. 204. (a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications, and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications, and maximum hours of service of employees, and safety of operation and equipment.

* * * * *

(6) To administer, execute, and enforce all other provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

* * * * *

(7) (c) The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle," or "contract carrier by motor vehicle," as the special nature of the services performed by such carriers or brokers shall require, and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

* * * * *

SEC. 205 (b) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administra-

tion of this part with respect to such operations: Applications for certificates, permits, or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; complaints as to violations by motor carriers or brokers of the requirements established under section 204 (a); and complaints as to rates, fares, and charges of motor carriers or the practices of brokers: *Provided, however,* That if the Commission is prevented by legal proceedings from referring a matter to a joint board, it may determine such matter as provided in paragraph (a) of this section. The Commission, in its discretion, may also refer to a joint board any investigation and suspension proceeding or other matter not specifically mentioned above which may arise under this part. The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokerage operations involved in such matter are proposed to be conducted: *Provided,* That the Commission may designate an examiner or examiners to advise with and assist the joint board under such rules and regulations as it may prescribe. In acting upon matters so referred joint boards shall be vested with the same rights, duties, powers, and jurisdiction as are hereinbefore vested in members or examiners of the Commission while acting under its orders in the administration of this part. Orders recommended by joint boards shall be filed with the Commission and shall become orders of the Commission and become effective in the same manner, and shall be subject to the same procedure,

as provided in the case of orders recommended by members or examiners under this section.

* * * * *

(h) Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I: *Provided*, That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under the Urgent Deficiency Appropriations Act, October 22, 1913, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

* * * * *

SEC. 206. (a) No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to Section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation

on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

SEC. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such

carriers may be authorized to engage in special or charter operations.

* * * * *

SEC. 208. (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

SEC. 209. (a) No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such

permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further,* That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

* * * * * *

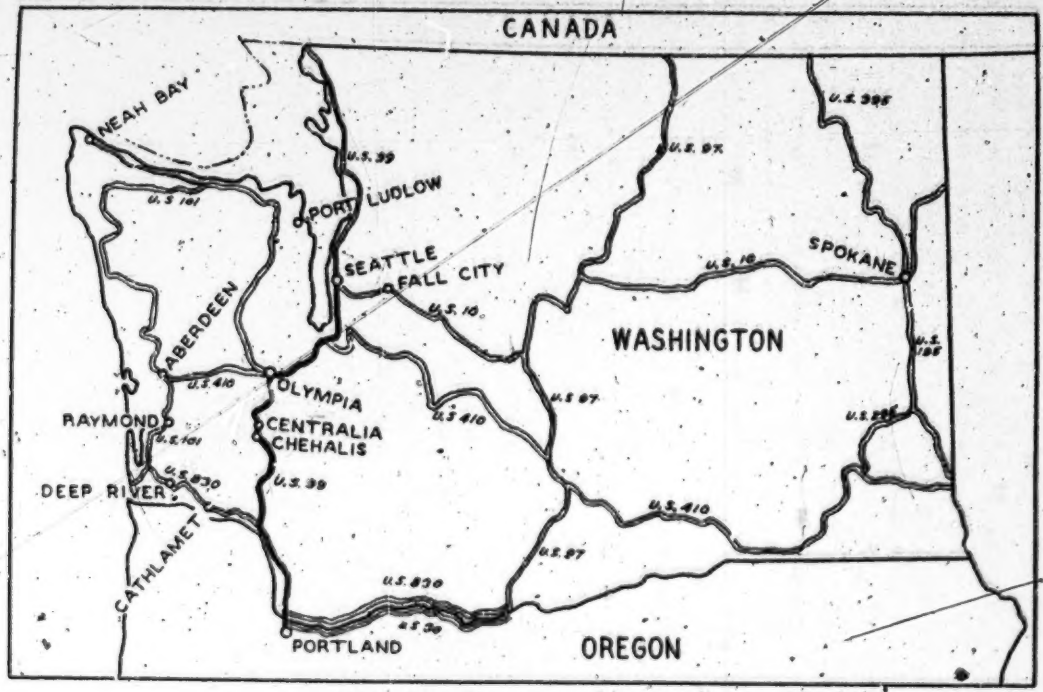
SEC. 222. (a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

(b) If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges, and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition, and enjoining upon it or them obedience thereto.

* * * * *

SEC. 227. (a) This part (except this section, which shall become effective immediately upon approval) shall take effect and be in force on and after the 1st day of October 1935: *Provided, however,* That the Commission shall, if found by it necessary or desirable in the public interest, by general or special order, postpone the taking effect of any provision of this part to such time after the 1st day of October 1935, as the Commission shall prescribe, but not beyond the 1st day of April 1936.

APPENDIX B



POINTS IN STATE OF WASHINGTON

To which appellee made trips "at various times between 1933 and 1936" (R. 8), the points "La Salle River and Greenwood could not be located by map or atlas, and are not shown.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

FEB 1 1939

In the Supreme Court

of the United States

OCTOBER TERM, 1938

No. 632

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

DAN E. MAHER, doing business as Interstate Bureau, *Appellee*.

BRIEF OF DAN E. MAHER, Appellee

WILLIAM L. HARRISON,
Porter Building, Portland, Oregon,
Attorney for Appellee.

W. LAIR THOMPSON,
EDWARD C. DOXEY,
Of Counsel.

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In the Supreme Court

of the United States

OCTOBER TERM, 1938

No. 432

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants

vs.

DAN E. MAHER, doing business as Interstate Busses, *Appellee.*

BRIEF OF DAN E. MAHER, Appellee

OPINIONS BELOW

The majority and dissenting opinions of the specially constituted District Court (R.12-22) are reported in 23 F. Supp. 810. The report of the Interstate Commerce Commission (R. 6-9) is reported in Dan E. Maher, Common Carrier Application, 3 M.C.C. 479.

STATUTE INVOLVED

Appellants state in their brief, that the primary question, excepting the jurisdictional question, involves a construction of the so-called "Grandfather" proviso of Section 206(a) of the Motor Carrier Act, 1935, C. 498, 49 Stat. 543 (U.S.C. Sup. 1, Title 49, Sec. 306(a)[1] (Appellant's Br. 3).

Appellee disagrees with this statement, and contends that not only is the "Grandfather" proviso 206 (a) involved, but, in addition thereto Sections 207 (a) and 208 (a) are involved, and this appeal requires the construction of these particular sections, not only separately, but concurrently, one with the other.

Also the Court's attention is directed to Section 202(a), which section sets forth the "Declaration of Policy", and Section 203(a) (14) which defines a "common carrier by Motor Vehicle".

The foregoing sections are printed in the appendix, infra, page 61.

---

[1] The statute will be referred to in the brief as "the Act", and the designation of sections thereof will follow the numeration found in the statute as enacted. Act of August 9, 1935, C. 498, 49 Stat. 543, Sections 201-227, rather than the numeration adopted in the Code (U. S. C. Sup. 1, Title 49, Sections 301-327).

STATEMENT

The evidence upon which the appellee seeks certificate rights, under the Act, is contained in the Findings of Fact heretofore made and entered by the Interstate Commerce Commission,[2] which said Findings of Fact are part of the pleadings in this matter (R. 6).

1. *Commission's Findings of Fact*[3].

The Commission found that applicant (appellee here) has been engaged in the transportation of passengers since 1931 (R. 7); that the service performed was over irregular routes between the States of Oregon and Washington; that the service performed was licensed in the State of Oregon, under an "anywhere-for-hire" permit issued by the Public Utilities Commissioner of Oregon (R. 8); that no certificate was required for the service in Washington (R. 8);[4] that service was performed at various times between 1933 and 1936 to Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, all in the State of Washington (R. 8); that service was being performed on June 1, 1935 (R. 9); that U. S. Highway 99 "*probably was used for at least part of*

[2] Hereafter referred to as the "Commission".

[3] Only those factual findings which we deem pertinent to the determination of this matter will be here enumerated.

[4] See Buck vs. Kuykendall, 267 U. S. 307.

the distance on most, if not all, of applicant's trips to Washington" (R. 9); that on May 29, 1936, a regular scheduled service between Portland, Oregon and Seattle, Washington was instituted (R. 7).

2. *Commission's Conclusions of Law*

The Commission concluded, as a matter of law, from the facts found, that applicant was not in bona fide operation as a common carrier of passengers between Portland, Oregon, and Seattle, Washington, over a regular route on June 1, 1935; that upon the commencenment of the regular scheduled service between said points on May 29, 1936, the appellee discontinued and/or abandoned the irregular service being performed on June 1, 1935 (R. 9); that carriers are entitled under the "Grandfather" clause to authority to continue *the bona fide operations* in which they were engaged on June 1, 1935 (R. 8).

In other words, the Commission held that *the operation* conducted by the applicant on June 1, 1935, having been abandoned, had not been "so operated since that time" 206 (a); and that *the operation* applied for, which was commenced on May 29, 1936, was not *the* operation conducted by the applicant on June 1, 1935.

3. *Order of the Commission*

The following order, based upon the Findings of Fact and Conclusions of Law of the Commission,

was made and entered on the 27th day of October, 1937 (R. 9), viz.:

> "It is ordered that said application be and it is hereby denied, effective December 10, 1937.
>
> And it is further ordered, that applicant be, and he is hereby notified and required to cease and desist on or before December 10, 1937, from all operations in interstate or foreign commerce as a common carried of passengers by motor vehicle."

PROCEEDINGS IN THE COURT BELOW

On December 15, 1937, the appellee filed a bill of complaint in the Federal District Court, for the District of Oregon, under the Urgent Deficiencies Act of October 22, 1913, Title 28, U.S.C.A., Section 41 (28) and Sections 43-48, inclusive, and by said proceeding prayed that the Commission's order, as hereinbefore set out, be set aside, annulled and enjoined, on the ground and for the reason that there was no evidence to support the order, that the Commission had exceeded its statutory powers, and had misinterpreted and misapplied the Motor Carrier Act of 1935, thereby denying the appellee due process of law, contrary to the Fifth Amendment of the Constitution of the United States of America (R. 1-3).

The only evidence before the Court, was the appellee's bill of complaint, and the answers of the Interstate Commerce Commission and United States of America, respectively. The answer of the Inter-

state Commerce Commission included, as a part thereof, the full report of the Interstate Commerce Commission, which included Findings of Fact and Conclusions of Law, and Order thereon (R. 4, 7). This was the only evidence before the Court, touching and concerning the appellee's operation, and upon which the appellee has submitted his cause.

Briefly, the appellee contended, in the court below, if it was established before the Commission that the appellee was in bona fide operation as a common carrier of passengers by motor vehicle in interstate commerce on June 1, 1935, *over a route or routes, or within a territory,* and had continued to operate since that time, that, he could not be denied a certificate of public convenience and necessity, in any event, and under the Act, it was incumbent upon the applicant to establish the route or routes, or territory within which he desired to operate,[5] and it was mandatory upon the Commission to issue a certificate under such application, as was reasonable, and to the best interests of the public.

In other words, it is the appellee's contention that the Act did not recognize a distinction between different types of motor carrier service, prior to the enactment of the Act; but, in the interests of a sound

[5] And, pursuant to such contention, the appellee did designate the service he wished to perform, which was substantially over the same route and, at least, within the territory previously served and instituted such service on May 29, 1936.

transportation system, it required operators to systematize their operation, by designating the service to be performed over any route or routes, in which they had previously operated, and if they had operated within a particular territory, to designate type of service which they desired to perform within that territory.

The Court below, in its majority opinion, upheld this contention.

The appellants have fallen into error in their interpretation of the Court's opinion (Appellant's Brief 11).

First: Appellants contend that the Court's opinion in fact rejected the appellee's contention, and was really consistent with the Commission's views, to the effect that the appellee should be confined in his future service to *the operation* conducted on June 1, 1935. So important is this error of appellant's interpretation of the opinion of the Court below that the pertinent provisions of the opinion are here set out in full, viz.: (R. 17, 18, 19)

> "It is true the act also provides that the operation must have been continued. But *the law does not denounce a change of one type of service to another.* Apt words could have been used if this were the intention. Undoubtedly the applicant would be confined to the exact service which he was furnishing on June 1, 1935. However, if one who had been operating a line in May and June of each year prior to June 1, 1935, had thereafter extended his service upon

a year-around basis, it could not be argued that he abandoned the seasonal service. Similarly, if he had thereafter operated for eleven months and in every month except May, he might have abandoned the month of May and might even be confined to transportation in June alone, but he could not entirely be denied a certificate. So Maher might well be confined to an "anywhere-for-hire" service upon U. S. Highway 99 and compelled to cease his 'fixed termini' operation, but he was still operating in interstate commerce over a route and within a territory and could not, therefore, be denied a certificate. The establishment of a 'fixed termini' operation could be deemed an abandonment of a claim for an 'anywhere-for-hire' service in the same territory since the act provides: (Italics ours)

> 'any common carried by motor vehicle transporting passengers under a certificate issued under this chapter may transport in interstate or foreign commerce to any place, special or chartered parties under such rules and regulations as the Commission shall have prescribed.' " Section 208 (c).

"Upon the facts, a distinction between a regular and an irregular route vanishes. The Commission found that all Maher's operations in interstate commerce were probably in part over U. S. Highway 99. This highway, then, is established for part of the distance, at least, as a regular route. It will be noticed that a regular schedule is not mentioned in the definition. If it be held that Maher is no longer entitled to operate over other routes than U. S. Highway 99, he certainly never abandoned his right to serve the public upon that road. If, on June 1, 1935, he was performing an 'anywhere-for-hire' service, it is inconceivable that he forfeited that right by placing his busses on schedule between 'fixed termini' on that road so that those per-

sons who wished to go to any point thereon for hire could do so without making special arrangements. In other words, if he be held to have abandoned his rights on other routes, his operation on U. S. Highway 99 after May 29, 1936, was an attempt to increase his service thereon, rather than to abandon it. But the fact that the Commission by certificate might only authorize an 'anywhere-for-hire' service in the territory contiguous to U. S. Highway 99 and falling short of Seattle, and compel him to cease operations over other highways altogether did not constitute a justification for its denial of his right to service at all."

"The statute gives it sufficient power by the terms of the certificate which it should have issued to protect any type of operations, for it may 'specify the service to be rendered and the routes over which the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate' and could attach 'to the exercise of the privileges granted by the certificate such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require.' Section 308. The Commission in many cases has heretofore exercised the power conferred upon it by granting the certificate applied for and imposing limitations. The cases of Hibbing, etc. Common Carrier Application, 1. M.C.C. 540; George Cassens, etc. Application, 1 M.C.C. 771; Slagle Contract Carrier Application, 2 M.C.C. 127 are illustrative of such action. In these cases the certificate was granted but delimited in terms in accordance with the previous business of the carrier.

> "The Commission, therefore, took action not permitted to it by the law. All the facts required by Congress for the issuance of a certificate under the proviso of 306 (a) were found. The issuance was, therefore, mandatory. The Commission failed to issue a certificate because two erroneous conclusions of law were drawn; first, that an operation in interstate commerce 'over a route' and 'within a territory' was not entitled to protection when not over a regular route and between fixed termini, and second, that an irregular operation in interstate commerce was abandoned where a regular operation over the same route and within the same territory was carried on."

From the foregoing, it is evident then, that the court below distinguished between *the operation* as conducted by the appellee on June 1, 1935, and *the service,* which was being performed on that date. An analysis of this part of the opinion discloses the real meaning of the above quoted statement. That is, the Court held:

> "* * * The law does not denounce a change of one type of service to another. * * * Upon the facts a distinction between a regular and irregular route vanishes * * * that all of Maher's operations in interstate commerce were probably in part over U. S. Highway No. 99. This highway then is established for part of the distance at least, as a regular route. *It is to be noticed that a regular schedule is not mentioned in the definition.* If it be held that Maher is no longer entitled to operate over other routes than U. S. Highway No. 99, he certainly never abandoned his rights to serve the public upon that road." (Italics ours.)

Therefore, it can readily be seen that the Court below, when referring to the "exact service which he was furnishing on June 1, 1935.", did not refer to any particular type of operation, but referred to the territory which was at that time being served by the appellee.

Second, applicants contend that the court below was in error when it held that the appellee was denied his legal rights by the Commission, when it failed to consider his application under Sec. 207 (a) of the Act, to determine whether public convenience and necessity required a continuance of the operation in which he was engaged, upon his failure to establish certificate rights under Sec. 206 (a) because there was no showing either at the time of the hearing, or was it alleged in appellee's bill of complaint, that public convenience and necessity required such operation (Appellant's Br. 11). But, whether the procedure provided for in Section 207 (a) concerns only applications for new operations, as contended by the appellants, and is not to be considered in connection with applications filed under Section 206 (a), "Grandfather" clause, is at least argumentative.

Appellants contend because the Commission has provided different forms of applications, and adopted different procedure in determining certificate rights under the respective forms, that this fact is determinative of the construction to be placed upon this proviso of the Act. The appellee has at all times

adopted the forms, and followed the procedure designated by the Commission. He has had no other alternative, and suffice it to say, at this time, such action on the part of the Commission is consistent with its Findings and Order involved in this controversy, and this action of the Commission is no less vulnerable to attack because it is, in fact, the initial action taken by it upon which is predicated its Order, which is now subject to review.

The Court did make and enter Findings of Fact, and Conclusions of Law, which were filed nunc pro tunc as of July 9, 1938 (R. 24-28), and based thereon suspended that part of the Commission's order, which denied the appellee the certificate as applied for, until such a time as the Commission either, upon further hearing, or upon the record now in its possession, grants to the plaintiff a certificate *delimited* under the terms of the statute, or denies a certificate in conformity with the statutory requirements; and ordered that the cease and desist order of the Commission be annulled, cancelled and set aside.

ASSIGNMENTS OF ERROR

The appellants have designated, in the transcript of record, fourteen separate Assignments of Error (R. 31). Many of the alleged errors appear to be but a duplication of others. However, appellants, on argument in support of said alleged errors, have summarized the same, and the writer of this,

he appellee's brief, believes that if answer is made directly to the contentions of appellants, as contained in their summarization, much duplication will be avoided. The appellants have summarized and presented the issues involved, as follows (Appellant's Br. Index):

I. The appellee is not entitled to a certificate under Section 206 (a) of the Act.

A. The Commission lawfully refused to issue a certificate under Section 206 (a) authorizing appellee to operate as a common carrier of passengers over U. S. Highway 99, as a regular route, between Portland and Seattle, as fixed termini, and intermediate points, as applied for, because appellee was not so engaged on June 1, 1935.

B. The Commission is not required to issue Appellee a certificate under Section 206 (a) authorizing a re-establishment of any part of the anywhere-for-hire service which he conducted prior to May 29, 1936, and on and before June 1, 1935.

1. Appellee did not continue the service in which he was engaged on June 1, 1935, as Section 206 (a) requires.

2. Appellee did not apply for a certificate authorizing the operation of an anywhere-for-hire, special or charter service over U. S. Highway 99 and it nowhere appears of record that he desires such a certificate or would be willing to perform such a service.

II. The Commission was not obligated to consider appellee's application under Section 207 (a) of the Act and to determine whether the proposed service is or will be required by the

present or future public convenience and necessity.

A. The provisions of Section 206 (a) of the Act did not require the Commission to consider Appellee's application under Section 207 (a).

B. Appellee did not apply for a certificate under Section 207 (a) and his bill of complaint does not allege that the present or future public convenience and necessity requires his regular operation between Portland and Seattle or that he made any claim or presented any evidence with respect to this issue before the Commission.

III. The District Court had no jurisdiction under the Urgent Deficiencies Act to review the order of the Interstate Commerce Commission.

SUMMARY OF ARGUMENT

The appellee contends upon this appeal that the Commission, in denying the application for authority to operate as a common carrier of passengers, upon a fixed termini, scheduled service between Portland, Oregon, and Seattle, Washington, over U. S. Highway No. 99, construed the Act beyond the power which it can constitutionally exercise, and beyond its statutory right, and based its conclusions upon a mistake of law. Interstate Commerce Commission vs. Union Pacific Railroad, 222 U.S. 541-547. Or, in other words, that the action taken by the Commission was arbitrary, unjust, and unreasonable, and contrary to the facts found by it. in violation of the constitutional prohibition against

taking property without due process of law.

It is appellee's contention that he was, on June 1, 1935, a common carrier of passengers in interstate commerce "over a route, routes, or within a territory" between the states of Oregon and Washington, and particularly over routes and within a territory between Portland and Seattle, in these respective states. That the Act did not confine him to "the operation", which was being conducted on the "Grandfather" date, namely, June 1, 1935, but that, having once established a bona fide legal interstate operation, over a certain route or within a territory, it was not only the right of the operator to designate the particular type of service which he wished to perform over such route, and within such territory, but that under the Act it was incumbent upon him to designate the type of service which he wished to perform, which was either fixed termini service, or special or charter service, Sec. 207 (a), and having once designated the type of service to be performed, it was mandatory upon the Commission to authorize the service within reasonable limits and bounds; Sec. 208 (a)[6].

Appellee further contends that, upon designating a certain restricted route within a territory,

[6] District Judge Fee said (Opinion R. 21):

The Commission could thereupon either upon further hearing or upon the record now in its possession, grant to plaintiff a certificate delimited under the terms of the statute or deny the certificate upon findings which would conform with the statutory requirements.

upon which he has previously operated, that such designation, and the performance of service thereover, while amounting to an abandonment of the other routes or territory within which service had been performed, did not amount to an abandonment of service over the route, and within the territory in which service was being performed, so long as it was continuous.

And lastly, that the order of the Commission, and each and every part thereof, was an affirmative order, over which the court had jurisdiction.

ARGUMENT

It is the purpose of the appellee, at this time, to answer directly the affirmative contentions of the appellants, as they chronologically appear in their brief.

I.

THE APPELLEE IS NOT ENTITLED TO A CERTIFICATE UNDER SECTION 206 (a) OF THE ACT, (because)

A. THE COMMISSION LAWFULLY REFUSED TO ISSUE A CERTIFICATE UNDER 206 (a), AUTHORIZING APPELLEE TO OPERATE AS A COMMON CARRIER OF PASSENGERS

OVER U. S. HIGHWAY 99, AS REGULAR ROUTE, BETWEEN PORTLAND AND SEATTLE, AS FIXED TERMINI AND INTERMEDIATE POINTS AS APPLIED FOR, BECAUSE APPELLEE WAS NOT SO ENGAGED ON JUNE 1, 1935 (Appellants' Br. 20).

Appellants contend that appellee failed to make a showing that he was in bona fide operation as a common carrier on June 1, 1935, on a fixed termini scheduled operation between Portland, Oregon, and Seattle, Washington, and because of this failure, the Commission lawfully refused to issue a certificate under Section 206 (a).

In support thereof, the appellants argue the most strict and strained construction of the Act, as is humanly possible. The fallacy here arises, because the Commission read into the Act a wording which is not present. The Act, in plain and distinct language, states:

> "* * * If any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route, or routes, or within the territory for which application is made, and has so operated since that time * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation."

In construing this provision, the Court below

said (R. 16):

> "Congress did not, in this section, require a limitation to 'regular' route or routes, or between 'fixed termini', nor make an exception as to charter or special operations. Neither was an actual 'public convenience and necessity' requisite since Congress deemed the previous actual operation guaranteed the necessity and convenience of the public."

And futher, the Court below said (R. 17):

> "But the law does not denounce a change of one type of service to another. Apt words could have been used if this were the intention."

The Commission attempts to diminish the importance of appellee's operation, because infrequent trips were made over the route, or within the territory, but from the above analysis, as laid down by the Court below, regularity of trips is not the prime essential, and, as said by the court below (R. 16-17):

> "*Bona fide operation over a route, or over a number of routes or within a territory is thus the prime essential. The intention to include all types of operation is made clear by the fact that the applicant was not confined to a route or routes, but was to be qualified if he operated within a territory* * * * but both the 'Anywhere-for-hire' operations, which were begun in 1931 and continued at least until the initiation of the service between Portland and Seattle, in May, 1936, and the operation with 'fixed termini' then begun, and continning to date, were 'over a route' U. S. Highway 99, between two points, and 'within a territory' viz: that territory reached over U. S. Highway 99, and between Portland and Seattle. Maher made application

for this route, and this territory according to the pleadings."[7] (Italics ours.)

Yet, the Commission in its Conclusions of Law, stated (R. 8):

"Carriers are entitled under the "Grandfather" clause to authority to continue *the* bona fide

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[7] In Black Hills Transportation Company, Common Carrier Application, 2 M.C.C. 391, 395, which was a "Grandfather" application, the Commission said:

"Certain protestants urge that applicant's operation between South Dakota points and Gillette (Wyoming) did not on June 1, 1935, constitute a bona fide operation within the meaning of the Act. *This contention is based on the fact that the first trip to Gillette was made on May 28, 1935, and that only six more trips were made during the next six months.* It is true, as stressed by these protestants, that applicant's trucks were not operated on fixed schedules on known days of each week or month, however, applicant maintained a tariff of its rates to and from Gillette, and its president testified that it was ready and willing to transport, and did transport, all traffic offered to it prior to the institution of this operation. Applicant secured authority from the Public Service Commission of Wyoming to extend its operations to Gillette, and otherwise complied with all requirements of the laws of both Wyoming and South Dakota. There is no suggestion of record, that this extension was not made pursuant to a well conceived plan of extending the transportation service offered to the public by the applicant. Careful consideration of all evidence of record, leads us to the conclusion that applicant's operation to and from Gillette was a bona fide operation on June 1, 1935."

Therefore it can be readily seen that the Commission did not limit "Grandfather" rights to the frequency of the service.

operations in which they were engaged on June 1, 1935, and continuing thereafter."

Nowhere in the Act is any reference made to the expression *the operation*, and only by the insertion of the word *the* in the Act, could the Commission come to the conclusion that it did.

If the Congress had intended the result, as adopted by the Commission, it could have, by apt words, said as much. In other words, the Congress could have said, as follows: *Any person engaged in interstate commerce by motor vehicle on June* 1, 1935, *is entitled to continue THE type of operation so conducted on that date, and none other.* Under such wording no question would arise. But the Congress did not use such language. The obvious intent of Congress is contained in the plain and unambiguous language of the Act. No one will seriously argue but that the Act was regulatory in nature. Being so, Congress certainly must have intended to protect the interstate carriers in bona fide existence on June 1, 1935,[8] But it is unquestioned that the Congress also desired to systematize operations, and confine interstate carriers to a definite, well-defined type of service.[9] For this reason, the Act includes this language, Section 207 (a):

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[8] In Butcher Contract Carrier Application, 1 M.C.C. 485, 486-487, the Commission said:

"The whole policy evidenced in the 'Grandfather' clause indicates that the Congress did not intend to penalize operators who failed to file within a specified date, beyond requiring proof from them

which was dispensed with by those who filed in time. *It is in conformity with the declared policy to protect the interest of the public by authorizing the continuance of a transportation system which had been built over a substantial period of time rather than virtually to order its cessation.*" (Italics ours.)

9 In Blue & Gray Sightseeing Tours, Inc., Common Carrier Application, 8 M.C.C. 124, 127-128, which was a "Grandfather" Application, seeking authority to conduct sightseeing and pleasure tours over regular and irregular routes within the vicinity of Washington, D. C., the Court said:

"We have described applicant's service in detail. It consists principally of sightseeing operations, in which tickets generally are sold to individual passengers. Applicant also engages in charter operations, in which parties are transported for a lump sum, and are entitled to the exclusive occupancy of the vehicle or vehicles furnished. Some of its sightseeing operations for individual passengers, are over regular routes, and others are over irregular ones.

Section 207 (a), *which authorizes issuance of certificates,* contains the following provision: (Italics ours)

'Provided, however, that no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations'.

"Applicant's regular route operations are designed to meet the needs of sightseers, and would not serve the purposes of persons desiring expeditious transportation between points. Consequently, we conclude that applicant's regular route sightseeing operations are special operations within the meaning of the provision of Section 207 (a), quoted above. *The Act does not require that we prescribe regular routes for special operations,* and there appears to be no

need for doing so in the instant case. Omission of such prescription will make the operations flexible, and enable their adaptation to the varying demands for service. *The certificate which we shall grant, will, therefore, authorize the performance of all of applicant's special operations over irregular routes.*" (Italics ours.)

Hence it can be seen, under the ruling in this case, that the Commission itself construed Sections 206 (a) and 207 (a) together, and having decided that the applicant was entitled to "Grandfather" rights under Section 206 (a), delimited his further operations pursuant to the provisions contained in proviso 207 (a).

"Provided, however, that no such certificate shall be issued to any common carrier of passengers by motor vehicle *for operations over other than a regular route or routes and between fixed termini* except as such carriers may be authorized to engage in special or charter operations."

Appellants may contend that the expression "such certificate" pertains only to certificates authorizing new operation under their interpretation of proviso 207 (a). However, such certificate applies to a certificate of public convenience and necessity, and whether or not the applicant qualifies for a certificate under the "Grandfather" clause (Sec. 206 (a)), or a new operation (Sec. 207 (a)), "such certificate" is always a certificate of public convenience and necessity.

Further, apparently Congress intended to give the Commission some discretion in the exercise of its semi-judicial powers, when it used the language, Section 208 (a), as follows:

"*Any* certificate issued under 206 or 207 shall specify the service to be rendered, and the routes over which, the fixed termini, if any, between which, and the intermediate and off points, if any at which, and in case of operation not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate."

Obviously the Congress contemplated the desirability and feasability of different types of interstate operation, which may or may not be fixed termini service, but may be special service within a territory, and so provided by the Act for the Commission to authorize such service, but appellee forceably contends that it is incumbent upon the applicant, whether applying under the "Grandfather" clause, or the so-called "new operation" clause, that he designate either fixed termini service or special or charter service, and that the Commission then exercise its discretion, it having once approved the qualification of the operator to specify the service to be rendered.[10] Certainly such a construction of the Act would place the applicant carrier "plainly within its terms". McDonald vs. Thompson, No. 55, October term, 1938, decided December 5, 1938.

There can be no question but that the appellee was in bona fide operation as a common carrier on June 1, 1935 (Opinion, R. 16):

"Nowhere in the findings of fact is it suggested that Maher's operations were not bona fide."

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[10] See Blue and Gray Sightseeing Tours, Inc., supra.

Appellants attempt to make an issue, as to whether or not the appellee was in fact a "common carrier" within the meaning of the Act, and, consistently refer to the appellee's operation as one furnishing service only to special groups, seeking group transportation. Suffice it to say, the evidence before the Commission was such that this issue was not raised. At any rate, the Commission did not deny that the appellee undertook "to transport passengers for the general public in interstate commerce by motor vehicle for compensation", and was within the provisions of Section 203 (a) (14). While he may have, at times, carried special groups within the meaning of 203 (a) (15), there is no evidence in the record that he did not at all times hold himself out to transport passengers generally, within the "common carrier" definition.

Appellants make much of the fact that if, under the Act, an intermittent, irregular "Anywhere-for-hire" service in a territory can be converted into an absolute and vested right to establish a regular scheduled service between fixed termini, anywhere on those routes, or within that territory, irrespective of any consideration of public convenience and necessity, that such interpretation would give rise to unnecessary duplication of facilities, and wasteful competition, which would prevent the development of an adequate, economical and efficient service by motor carrier. Let it be said here, in answer to such contention, that the appellee appreciates as much

as anyone else, the importance of this proposition, but let it be remembered that at all times since 1931, the appellee could have made unlimited trips daily between Portland, Oregon, and Seattle, Washington, carrying hundreds of passengers, and as the record discloses (R. 8), "he sometimes went into the State of Washington twice a day with two cars". Then, the force of this argument vanishes, because, as a matter of fact, the so-called "duplication of facilities" and "wasteful competition" has always been present, and wherein is the public harmed, and our transportation system confused, when the operator simply designates the time and places within which his operation shall be limited?

Appellants further contend:

B. THE COMMISSION IS NOT REQUIRED TO ISSUE APPELLEE A CERTIFICATE UNDER SECTION 206 (a), AUTHORIZING A RE-ESTABLISHMENT OF ANY PART OF THE "ANYWHERE-FOR-HIRE" SERVICE WHICH HE CONDUCTED PRIOR TO MAY 29, 1936, AND ON AND BEFORE JUNE 1, 1935 (because)

1. APPELLEE DID NOT CONTINUE THE SERVICE IN WHICH HE WAS ENGAGED ON JUNE 1, 1935, AS SECTION 206 (a) REQUIRES.

Under this contention, appellant argues that because appellee instituted a fixed termini scheduled

service on May 29, 1936, between Portland, Oregon, and Seattle, Washington, that he abandoned his service to all other points theretofore served on June 1, 1935, and hence because of such abandonment of service he had not continuously "so operated" since that time (June 1, 1935).

The appellee, in answer thereto, admits for the sake of argument, that all other territory and/or service which was being served and performed on June 1, 1935, has been abandoned, save and except that territory between Portland, Oregon, and Seattle, Washington.

In the first place, the appellee did not apply for a certificate authorizing service to any points or territory, excepting the Portland to Seattle operation, and does not now, nor never has applied or asked the Commission for a certificate authorizing the re-establishment of such service.

In the second place, appellee contends that the institution of his fixed termini scheduled service between Portland and Seattle, on May 29, 1936, was not an abandonment of the service being performed within the territory on June 1, 1935, but that he has continuously operated since that date over this particular route. The test of what part of the service performed by the applicant on June 1, which has been abandoned, and what part has been retained, is contained in the application itself, and it might be said, in passing, that the applicant never desired to abandon any part of the operation so performed

on June 1, 1935, but so adjusted and regulated himself to such an operation as the Act required. Section 207 (a).

The appellants again confuse the broader intent and meaning of the Act. Appellee contends that Congress intended to protect the "service" being offered the public as of June 1, 1935, whereas the appellants consistently adhere to the constrained expression "the operation". When considered with the broader viewpoint, and consistent with the provisions of the Act, the appellee has always served and transported the public over U. S. Highway 99, between Portland and Seattle (R. 9) :[10]

> "While U. S. Highway No. 99 probably was used for at least part of the distance, on most, if not all of applicant's trips into Washington * * *."

In other words, service over U. S. Highway 99 was being performed on June 1, 1935, and has been continuously performed since that date. Where is there an abandonment of this part of the service rendered by the appellee? The Court below said (Opinion R. 18) :

> "In other words if he be held to have abandoned his rights on other routes, his operation on U. S. Highway 99 after May 29, 1936, was an attempt to increase his service thereon, rather than to abandon it."

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[10] See also Lower Court's Findings of Fact IV, V, VI, VII, VIII and IX (R. 26 and 27).

And further, appellants contend:

2. APPELLEE DID NOT APPLY FOR A CERTIFICATE AUTHORIZING THE OPERATION OF AN "ANYWHERE-FOR-HIRE" SPECIAL OR CHARTER SERVICE OVER U. S. HIGHWAY NO. 99, AND IT NOWHERE APPEARS OF RECORD THAT HE DESIRES SUCH A CERTIFICATE OR WOULD BE WILLING TO PERFORM SUCH A SERVICE.

The answer to this proposition is contained in Appellant's own brief, page 37, wherein they state:

> "It is not incumbent upon the Commission to issue a certificate of public convenience and necessity authorizing a type of service for which application has not been made."

This statement is true. The appellee did not apply for a certificate authorizing an "anywhere-for-hire", special or charter service over U. S. Highway 99, and it is beside the point whether or not he desires such a certificate, or would be willing to perform such service. And furthermore, appellants beg the question, when they state that "appellee did not apply to the Commission for a certificate authorizing the transportation of special groups of passengers over U. S. Highway 99, or any part thereof, as he was doing on June 1, 1935". There is no finding any place in the record, that appellee's business con-

sisted in transporting special groups, although he did, on certain occasions, transport special groups of passengers. He was none the less a "common carrier" within the definition of the Act, and as stated before, by his application he simply applied for a service under the procedure as provided by the Act; that is, as a common carrier of passengers over the routes and within the territory, and particularly between Portland, Oregon, and Seattle, Washington, which was over the route and within the territory he was serving on June 1, 1935.

II.

Next, the appellants contend (Appellant's Br. 38):

THE COMMISSION WAS NOT OBLIGATED TO CONSIDER APPELLEE'S APPLICATION UNDER SECTION 207 (a) OF THE ACT AND TO DETERMINE WHETHER THE PROPOSED SERVICE IS OR WILL BE REQUIRED BY THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY (because),

A. THE PROVISIONS OF SECTION 206 (a) OF THE ACT DID NOT REQUIRE THE COMMISSION TO CONSIDER APPELLEE'S APPLICATION UNDER 207 (a).

Appellants contend that the Court below misconstrued the grammatical construction of the Act.

and particularly confused the antecedent of the word "otherwise" (appellant's Br. 39), claiming that the word "otherwise" pertains, only, in event the application under 206 (a) is not filed within the 120-day period. Again the appellants are seeking to place a forced, and strained construction upon the wording of the Act. Appellee does not so agree.

In the first place, it is believed that all grammarians are in accord, that each sentence is to convey a single thought, qualified by phrases and clauses, but in any event, a period at the end of such statement marks the termination of that particular thought. Then the succeeding sentence, while likewise stating a particular thought, with qualifications, can, in itself, qualify the prior sentence, or any phrase or clause thereof, if special reference is made thereto, which procedure can go on indefinitely to the point where it forms a paragraph, evincing the whole. But, unless special reference is made in this succeeding sentence, qualifying a particular phrase or clause in the prior sentence, then such qualification goes to the whole preceding sentence.

In the consideration of this so-called grammatical by-play, is it reasonable to suppose that the Congress was unfamiliar with the rules of syntax? Is it fair for appellants, for the sake of their argument, to reconstruct the phraseology of the Act, and arbitrarily designate a certain proceeding clause, and say that the succeeding sentence qualifies only that clause, and to ignore especially the importance

of the *period* which separates the two sentences? In other words, the Act says, in substance:

> "If the applicant has been in bona fide operation on June 1, 1935, over a route, routes or within the territory for which application is made, and has so operated since that time, and seasonably files his application, then the Commission shall issue a certificate without further proof of convenience and necessity."

This is one complete thought idea, with its qualifications, and each and every distinct provision or qualification therein stated is a condition precedent to the issuance of a certificate. Then the Act goes further, and says:

> "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 207 (a), etc."

The Court must bear in mind that "such certificate" as therein referred to, means a certificate of public convenience and necessity. Why should "otherwise" refer any more to the time within which the application is to be filed, than it should to whether or not the applicant was in operation on June 1, 1935, or whether he was in *bona fide* operation on that date, or whether he was operating over a route or routes, or within the territory for which the application is made on that date, or whether he has so operated since that time?

As the Court below has so aptly said (Opinion R. 19):

"The intent of Congress was to permit no operation by an applicant after certificate had been denied, and it was therefore intended that all possibilities should be exhausted on the one application. No assumption is necessary to arrive at this conclusion, since Congress requires affirmative action by the Commission."[11]

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[11] In Bowles Common Carrier Application, 1 M.C.C. 589, application was filed within the time limited by the Act, seeking a certificate of public convenience and necessity, authorizing operation as a common carrier by motor vehicle of petroleum products over specified routes. However, the evidence disclosed that applicant was in fact a contract carrier, and the Commission so considered his application, in spite of the fact that it was not filed on the form prescribed by it. The Commission said (Page 590):

"Although the record indicates that applicant has transported property only for those with whom he has individual contract agreements, written or verbal, applicant testified that since his operations began he has held himself out to the public to accept any and all shipments of petroleum products, and that he is prepared to purchase additional equipment if the public demand should require that he do so. In view of the substantial number of contracts into which applicant had entered prior to October 15, 1935 (the effective date of the Act), the rapid increase in the amount of traffic which he hauled subsequent to that date, and the uncertainty in the minds of many concerning the distinction between a common carrier, and a contract carrier under the terms of the Motor Carrier Act of 1935, we are of the opinion that it would be unnecessarily harsh even assuming that applicant erred in respect to his former status, to grant the prayer of protestants, that the application be denied because applicant did not begin *common carrier service* prior to October 15, 1935, and continued it thereafter as stated in the application. Equity would seem to demand rather

that this application be treated as one to institute a new common carrier operation, and not as one to continue a common carrier operation instituted before Section 206 of the Act became effective, *and we shall so treat it.* We feel that by such treatment all parties will have been accorded substantial justice, since applicant will not, thereby, be relieved of the burden of proving public convenience and necessity." (Italics ours.)

In Jaax Common Carrier Application, 1 M.C.C. 597, application was filed under the "Grandfather" clause, for authority to operate as a common carrier between points in Minnesota and South Dakota. The application was filed within the time limited by the Act. The applicant included points in the application which he had not served on June 1, 1935, but which he had served subsequent to that date. The Commission said (page 599):

"An application on the proper form (B.M.C. 9—New Operation application) filed as of the same date in respect of the same extension of service would permit continuation of the operation until otherwise ordered by the Commission. In view of the circumstances in this case, we are of the opinion that this application should be construed as having the same effect, and as amended by applicant's statements at the hearing, as requesting a finding of public convenience and necessity as to this extension, and the issuance of a certificate thereunder when, as here, the record plainly establishes the need for a continuance of service *which has been carried on openly for some time, and an application on file with the Commission seeks a certificate in respect of such operation,* and the application is not opposed, we feel that the requirement of the filing of an amended application on the proper form would constitute unnecessary technicality." (Italics ours.)

It is true in the instant case, the application was opposed, but protestants also followed the procedure adopted by the Commission, and no issue was ever made as to public convenience and necessity.

In Michael Common Carrier Application, 3 M.C.C. 617, the applicant misconstrued the function of the different forms of application as adopted by the Commission, but the Commission considered a new form application (B. M.C. 9) as a "Grandfather" application (B.M.C. 2).

Whether or not the Court's contention in this respect did encourage "exaggerated claims" is beside the point. After all, we do not believe that the Congress intended to deprive bona fide operators, making an honest living, by virtue of their operations, of the opportunity to make their business consistent within the provisions of the Act, which was primarily adopted for the purpose of regulating them.

And further, appellants contend that the Commission was not obligated to consider appellee's application under Section 207 (a), because:

B. APPELLEE DID NOT APPLY FOR A CERTIFICATE UNDER SECTION 207 (a) AND HIS BILL OF COMPLAINT DOES NOT ALLEGE THAT THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY REQUIRES HIS REGULAR OPERATION BETWEEN PORTLAND AND SEATTLE, OR THAT HE MADE ANY CLAIM, OR PRESENTED ANY EVIDENCE WITH RESPECT TO THIS ISSUE BEFORE THE COMMISSION.

In answer to this proposition, the appellee again

states that he followed the procedure adopted by the Commission in the first instance, under its construction of its regulatory powers under the Act. He had no other alternative. And, in this respect, the action of the Commission, in its entirety, including the methods adopted by it for the filing of applications, to its concluding order denying the certificate in the instant case, is under attack. An injustice would be done the appellee, if this Court could now say, in effect, that an applicant, following the dictates of the Commission, as to the forms prescribed for filing applications, loses whatever rights he may have, or had, because the procedure adopted by the Commission was erroneous in the first instance.

And further, the Act itself contemplates a showing of "public convenience and necessity", and makes a bona fide operation on June 1, 1935, a presumption that such fact exists, by virtue of the "Grandfather" clause, which states, in substance, that "public convenience and necessity" exists when an operator has once established his bona fide operation on the "Grandfather" date, and the record discloses that appellee was a bona fide interstate motor carrier operator on that date, within the territory applied for and particularly over Highway 99.[12]

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[12] Successful operation over a considerable period is some evidence that there is a need for service. Stapleton Motor Carrier Application, 4 M.C.C. 600, 601.

III.

The appellant's next proposition is:

THE DISTRICT COURT HAD NO JURISDICTION UNDER THE URGENT DEFICIENCIES ACT TO REVIEW THE ORDER OF THE INTERSTATE COMMERCE COMMISSION (Appellant's Br. 47).

The order here under review, as entered by the Commission (R. 9-10), is:

> "It is ordered that said application be and it is hereby denied effective December 10, 1937.
>
> And it is further ordered that applicant be and he is hereby notified and required to cease and desist on or before December 10, 1937, from all operation in interstate or foreign commerce, as a common carrier of passengers and their baggage by motor vehicle."

Appellants contend that this order, and every part thereof is "negative" in form and therefore not reviewable under the Urgent Deficiencies Act, c. 32, 38 Stat. 208, 219-220, 28 U.S.C. 45, 47a.

In support of this contention, it is urged that the first part of the order, denying the certificate, is merely a determination of the appellee's status as an operator and as such, the risk involved arises by virtue of the statute and not from the order itself (Appellant's Br. 49).

And further, that part of the order notifying and requiring the appellee to "cease and desist" further operation as a common carrier "adds noth-

ing to the provisions of the statute or to the risks imposed thereby"; that is, the duty of the appellee to "cease and desist" from further operation is "not governed or established by any part of the Commission's order" (Appellant's Br. 52). The appellee disagrees with both contentions, and his answer to this proposition will be here fully and completely considered.

At the outset, it may be conceded that the Court has jurisdiction to review only affirmative orders of the Commission. Proctor & Gamble vs. U. S., 225 U. S. 282; Hooker vs. Knapp, 225 U.S. 302; United States vs. Griffin, et al, receiver, 303 U.S. 226; Intermountain Rate Case, 234 U.S. 476; Lehigh Valley Railroad Co. vs. United States, 243 U.S. 412; Powell vs. United States, 300 U.S. 276; Alton Railroad Co. vs. United States, 287 U.S. 229; The Chicago Junction Case, 264 U.S. 258; Piedmont & Northern Railway Co. vs. United States, 280 U.S. 469; Standard Oil Co. vs. United States, 283 U.S. 235; Baltimore and Ohio Railroad Co. vs. United States, 298 U.S. 349.

The determining factor as to whether or not an order of the Commission is affirmative or negative is: *Does the risk or illegality arise from the order, or from the statute?* Piedmont & Northern Railway Co. vs. United States, supra.

As to the first part of the order *denying* the certificate, appellants contend that the denial "does not direct the appellee to perform any act", and "is

not the kind of order which the Commission could itself enforce against the appellee", "nor does it impose any penalities upon the appellee", "or by itself subject the appellee to the risk of criminal prosecution" (Appellant's Br. 48).

In support of this contention, appellants state that Section 206 (a) prohibits operations without a certificate of "public convenience and necessity", and the appellee now has no such certificate, because he failed to qualify under his "Grandfather" clause application, and he not only now, but at all times in the past therefore ran and runs the risk of criminal penalties fixed by the Act, since he was not, in fact, one of the carriers covered by the "Grandfather" proviso. The cases cited in support of this contention, are Piedmont & Northern Railway vs. United States, 280 U.S. 469; Lehigh Valley Railroad Co. vs. United States, 243 U.S. 412; Shannahan vs. United States, 303 U.S. 596. The order entered in these cases is based upon clearly distinguishable facts, from the facts found in the instant case.

In the Piedmont case, supra, there was a statute in effect prohibiting any railroad carrier from extending its lines, or constructing new lines without first obtaining a certificate therefor. The Piedmont Company contemplated construction of an extension of its lines wtihout first obtaining a certificate of "public convenience and necessity", claiming that the proposed construction fell within the exemption

provision of paragraph 22 of Section 1, Interstate Commerce Act, as amended by Transportation Act of 1920. The Commission denied the application, which denial was affirmed by a three-judge District Court. However, the United States Supreme Court on appeal held that the order entered was negative in form, and refused to take jurisdiction, for the reason that the order was "not susceptible of violation", and "cannot call for enforcement"; that the penalities provided in the Act "are prescribed not for violation of the order, but for violation of the provisions of the statute, and the apprehended loss would be no greater by virtue of the Commission's order, than if the railroad had commenced building without trying to secure a certificate". In other words, in this case the applicant was not exercising any privilege which it had previously rightfully enjoyed, and of which an order would summarily terminate the exercise of such right. In the instant case, the applicant was entitled to continue the privilege which he was then exercising, until an adjudication of his rights by the Commission, and the order entered by the Commission did, in fact, enjoin the appellee from the continuation of these privileges.

In the Lehigh Valley case, supra, we find a like situation, as was presented in the Piedmont case. The Panama Canal Act forbid railroads to own water routes, which might otherwise be competitive, but provided for an extension, if it did not exclude or reduce competition on the water route. The Le-

high Valley Company petitioned the Commission for a determination of its extension rights. The Commission dismissed the petition on the grounds that the company had violated the Act, saying that *"the risk is the same that it was before the order, or that it would have been if appellant had not applied to the Commission"*. Here again we do not find any pre-existing right or privilege being exercised by the applicant, nor the enjoyment of a property right, nor the lawful continued exercise of the property right being denied.

In the Shannahan case, supra, the Chicago South Shore & South Bend Railroad was an interstate electric railway, subject to the Interstate Commerce Act. The National Mediation Board requested the Commission to determine whether the railway came within the exemption of the Railway Labor Act. The Commission found that the company did not come within the exemption, and was subject to the Act, *but it issued no order on its findings*. On appeal to this Court, the nature of this determination was considered, and this Court said (page 599):

> "Its decision is not even in form of an order * * *. The decision neither commands or directs anything to be done. It was merely preparation for proper action in some proceeding which may be instituted in the future * * *. The determination is thus not enforceable by the Commission; the only action which could ever be taken on it would be by some other body. It is clearly negative * * *."

So, in the Shannahan case, while the action of the Commission was considered by this Court to be negative, there was not even an order entered in the matter.

The facts in each of the above three mentioned cases are diametrically opposite to the facts as found by the Commission itself in the instant case. The appellee, here, was found to be a bona fide operator in interstate commerce on June 1, 1935, and by virtue of this fact, he was entitled to continue his service until such a time as the Commission found otherwise. In each of the cases above referred to, the applicants claimed future rights, and not past rights and privileges, under exemptions of the existing law applicable to their operations. Nowhere can it be found that they exercised any pre-existing rights or privileges, and were authorized by the statute to continue the exercise thereof, until an order was entered by the Commission denying the right or privilege. *Hence the risk involved in those cases admittedly arises by virtue of the statute, and not the order which is negative.*

The Court must look to the substance of the order as well as the form. In Alton Railroad Co. vs. United States, 287 U.S. 229, 237, it is stated: "The jurisdiction of Courts to review orders of the Commission is not dependent upon the form in which the order is couched."

Appellee contends that that part of the order entered in the instant case *denying* the certificate

is affirmative not only in substance but in form. The appellee has been and is now operating as an interstate carrier. The operation is not illegal under the statute, while the application for a certificate is pending (206 (a). It takes a denial of the certificate by a valid order to make his continued operation a crime. In other words, because of the order the appellee's future operation was "susceptible of violation". The order could "call for enforcement", and the order did "finally adjudicate the appellee's standing", and it does, in fact "enjoin the appellee from doing a particular thing".

And, as the Court below said (Opinion R. 20):

> "In Powell vs. United States, 300 U.S. 276, 285, the Commission struck out a tariff filed by the railroad whereby it included rates relating to a station which it was contended was not upon its line. The court says, in holding the order affirmative, in effect, 'the order * * * confines the Seaboard's service within the injunction switching limits, denies leave to that carrier to furnish, and prevents it from furnishing transportation to and from Fort Benning'. In the instant case, by refusing to grant the certificate upon the facts found, the Commission did deny leave to plaintiff to furnish, and did prevent it from furnishing transportation over U. S. Highway 99, in accordance with its previous service. *This case is stronger than the Powell case, for here the plaintiff was in actual operation legally before the Act took effect.* A railroad has no legal right to operate an extension without a certificate based on a finding of public necessity and convenience. In the absence of the certificate here, the act of opera-

tion becomes a crime, and is punishable." (Italics ours.)

See also Baltimore & Ohio Railroad Co. vs. United States, 298 U.S. 349; Alton Railroad Company vs. United States, 287 U.S. 229; Intermountain Rate Case, 237 U.S. 476.

In other words, the order in the instant case *curtailed* a right and privilege which was previously enjoyed, and under the Act subject to continued enjoyment until a valid order was entered denying it. It was not a refusal to grant a right or privilege for the exercise of some future right which an operator claims. Therefore, for these reasons, the appellee contends that that part of the order *denying* the certificate is affirmative, and subject to judicial review.

Next, appellants contend that that part of the order notifying and requiring appellee to "cease and desist" while not only negative in form, is simply incidental to the dominant preceding portion of the order, and is "not decisive as to the character of the Commission's action". The appellee's answer to this proposition is that the "cease and desist" portion of the order speaks for itself, in that it contemplated future operation of the order; that is, it was not to be effective until a future date, which date established the time from whence a continued operation would be unlawful. In other words, the Act countenances continued operation by a bona fide operator, until an order is entered denying fur-

ther operations. The first part of the order, while denying the appellee's rights to further operations, must necessarily be followed by an effective date upon which the operations heretofore legally conducted are to cease, and by the very nature of the "cease and desist" order the Commission did indicate awareness of the fact that the applicant was actually engaged in an affirmative act.

Suffice it to say, all three judges below determined the "cease and desist" part of the order to be affirmative.[13]

---

[13] District Judge Fee of the court below said (Opinion R. 19, 20):

> "Based upon these erroneous interpretations, the Commission issued a 'cease and desist' order. This power was conferred upon that body by the statute under certain circumstances, Section 304 (6). But it was not the intent of Congress that when an applicant attempted to have his rights confirmed by a prayer for a certificate, the Commission should be empowered to issue an injunction. 'As Congress itself cannot be, so it cannot make its agent be, the final judge of its own power under the Constitution. Congress has no power * * * to prescribe what constitutes due process of law for its ascertainment. B. and O. Railroad Co. vs. United States, supra. Judicial action is required before the Commission could enforce the provisions of the statute designed to prevent operation without a certificate, Section 305 (h); United States vs. Griffin, Receiver, No. 63, February 28, 1938, United States Supreme Court. This action in issuing a 'cease and desist' order was unquestionably affirmative.
>
> Circuit Judge Haney said (Opinion, R. 22, 23): I believe a cease and desist order is ordinarily subject to review by this court. Tap Line Cases, 234 U.S. 1. * * * Since the order was a command to the petitioner, I believe it is an affirmative order, and within our jurisdiction."

For which reasons the appellee contends that the order, and each and every part thereof here under review, is affirmative and is subject to judicial review.

RECAPITULATION OF APPELLEE'S CONTENTIONS

The appellee, in attempting to squarely face the issues involved in this controversy, has heretofore directly answered the argument of the appellants as reported. However, the appellee has a distinct understanding of the Motor Carrier Act, and is aware that the piece-meal manner in which his contentions have been advanced by way of answer, may be somewhat obscure, and for this reason hereinafter states affirmatively what he deems the true and proper construction to be placed upon the Act, and which construction the court below in effect affirmed.

INTRODUCTORY

Historically speaking, prior to 1935 the Federal government did not regulate in any manner, the transportation of passengers and their baggage in interstate commerce by motor carrier. Such regulation, as was in effect, was enacted by the respective states. The transportation of passengers by motor vehicle had its inception with the jitney bus, and because of its frequency of service, and cheaper

rates, attracted large numbers of the travelling public, resulting in a serious impairment of passenger traffic on the established railroad lines. In the beginning there was no attempt to regulate the vehicles, and the laws enacted pertained solely to the licensing of the owners or drivers of such vehicles.

These operations were generally short haul operations, and thousands of car owners, for want of a better occupation, overnight became bus operators. There was tremendous duplication of service. The equipment was generally dilapidated, and not safe for passenger use. Unlimited competition resulted in rate cutting, and rate wars, and generally speaking, the operators disappeared over night into nowhere from whence they came.

The assessment of license and millage fees against the operators was mainly for the purpose of revenue, and not for the purpose of regulation, and because the railway revenue was being seriously impaired, many of the railroads acquired the more established bus lines, and maintained the same as "fighting ships" to stifle competition. This action was generally very successful. However, during the course of years, several bus operators maintained efficient, economical and safe equipment, and established themselves as convenient, necessary and desirable bus operators.

But because of the disorganized manner in which passengers were being transported in interstate commerce by motor carriers, under state regulation.

the Congress of the United States passed the Motor Carrier Act of 1935, which Act had for its purpose, the regulation of the transportation of passengers by motor carrier in interstate commerce. The whole purpose of the Act is codified in Section 202, being entitled "Declaration of Policy and Delegation of Jurisdiction". Without quoting verbatim, paragraph (a) of said section, the attention of the Court is directed to the so-called operative words thereof, which are: "recognize and preserve the inherent advantages of"; "foster sound economic conditions in"; "promote adequate economic service"; "improve the relations"; "develop and preserve a highway traffic system"; and "cooperation with the several states". Upon the passage of the Act, the *practical* effect, contrary to the well meaning intent of the Congress, is somewhat questionable, for the reason that on the Pacific Coast, and particularly between San Francisco, California, and Seattle, Washington, a virtual monopoly by purchase has come into existence, and the established interstate carriers either own or control, or manage and supervise the so-called competitive lines, having acquired the rights by purchase, by virtue of the "predecessor in interest" provision of the "Grandfather" clause. Within the territory here particularly specified, the appellee is the only independent interstate carrier remaining.

APPELLEE'S ANALYSIS OF THE ACT

It is the contention of the appellee, that the Act, particularly Sections 206 (a), 207 (a), 208 (a), has a two-fold interpretation.

A. THE MOTOR CARRIER ACT HAS DELEGATED TO THE COMMISSION THE POWER AND AUTHORITY TO QUALIFY OPERATORS.

There are two methods by which carriers can qualify:

1. Section 206 (a), the "Grandfather" clause, which states:

> "If any such carrier, or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes, or within the territory for which application is made, and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application be made within 120 days after this section shall take effect * * *. *Otherwise the application* for *such certificate* shall be decided in accordance with the procedure provided for in Section 207 (a) * * *."

2. Section 207 (a) states:

> "A certificate shall be issued to any qualified applicant therefore if it is found that the applicant is fit, willing and able properly to perform the service proposed * * * and that the pro-

posed service to the extent to be authorized by the certificate, will be required by the present or future public convenience and necessity * *."

The appellee seasonably filed his application under the "Grandfather" clause, Section 206 (a), and requested thereby a certificate of "public convenience and necessity", authorizing an interstate operation between Portland, Oregon, and Seattle, Washington, by virtue of the fact that he was in bona fide operation over this route, and within this territory on June 1, 1935. The proof required to qualify applicant under the "Grandfather" clause, did not refer to any particular type of operation. In other words, *the operation need not be a fixed service between termini; it need not be over a regular route; it need not be hourly, daily, weekly or monthly, but so long as the applicant performed a bona fide service, either over a certain "route or routes, or within a territory"*, he should qualify as an operator under this proviso of Section 206 (a). The Commission itself has defined the meaning of bona fide to be:

> "The question as we see it, is one of fact rather than law, where the operation is openly conducted without any element of pretense, disguise or concealment, and in such a manner as to indicate a real intent to conduct and maintain a transportation business. Operations so conducted are bona fide operations contemplated by the Act." Slagel Contract Carrier Application, 2 M.C.C. 127, p. 142.

It is appellee's further contention that the pro-

visions of the "Grandfather" clause, Section 206 (a), does not require, for the purpose of qualifying an operator, that he should actually render the service applied for on the exact date specified in the Act, and The Commission has so held in this respect, as follows:

> "It obviously was not the intent of Congress that a carrier must have been in physical operation to all points to which such carrier claims to have rendered service on the exact date specified in the statute. It is apparent that if such were the intent, and purpose of the 'Grandfather' clause provision, the effect would be to destroy the business of many small irregular operators who may not actually have been in physical operation to all points in the territory claimed on the statutory date, but who did serve a great number of points therein within a reasonable time before and subsequent to that date, a more appropriate view of the "Grandfather" clause date in such cases is that a carrier is entitled thereunder to claim the territory or points which it might reasonably have served by reason of its operation prior to, as well as on the statutory date, and subsequent thereto. In other words, the question in such cases is: What was the extent of the transportation business honestly and openly carried on by the carrier, as of that date?" Cassen & Sons Application, 1 M.C.C. 771, 774.

And in the application of Hibbing Van & Transfer Company, 1 M.C.C. 540-1, the Commission ruled that a transfer company was entitled to a certificate covering irregular operations over an irregular route. The Commission excluded from the certificate only those states in which the applicant had

never made any trips, although the applicant had authority to make such trips under permits held from those particular states.

The appellee was and is a bus operator. This occupation was, and is, his only means of gaining a livelihood. The evidence in the record indisputably shows that he has conducted bus service in Oregon and Washington since 1931, and that his principal route from Portland, Oregon, into the State of Washington was over U. S. Highway 99, and most certainly within the territory adjacent to said public highway, as far north as Seattle, Washington. During the years 1935 and 1936 it is true that the service performed in interstate operations was small, but this was not due to any change in the conduct of his business, but merely because of the fact that a smaller amount of traffic was available. His operations were not conducted under "disguise", nor were they "concealed", but were carried on "openly". Therefore, appellee contends, in any event, that he should qualify as a common carrier of passengers by motor vehicle in interstate commerce under the "Grandfather" clause, Section 206 (a), regardless of the specific type of service rendered on June 1, 1935, the operative date.

B. THE MOTOR CARRIER ACT EXTENDS THE POWER AND AUTHORITY TO THE COMMISSION TO REGULATE INTERSTATE COMMON CARRIERS BY MOTOR VEHICLE IN SUCH A MANNER AS IS REASONABLE AND CONSISTENT WITH THE PUBLIC INTEREST, AND PARTICULARLY TO REGULATE SAID CARRIERS WHO HAVE OTHERWISE QUALIFIED UNDER THE ACT.

The pertinent provisions applicable to this provision are:

> Section 207 (a) "* * * provided, however, no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations other than a regular route or routes, and between fixed termini, except special or charter operations as authorized by the Commission."
>
> Section 208 (a) states: "Any certificate issued under Sections 206 or 207 shall specify the service to be rendered, and the routes over which the fixed termini, if any, between which, and the intermediate and off-route points if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate * * *."

Appellee contends that under these sections, that the Commission has *no authority to regulate a carrier's qualifications;* that it is incumbent upon the

Commission *to regulate the service to be performed by a carrier, after such carrier has qualified.* That is, the type of certificate to be granted is reserved to the discretion of the Commission. Let it be said here, that the appellee was not technically engaged in, nor did he desire authority to operate a charter or special service. Special operations, as observed from the many reports heretofore entered by the Commission, pertain to the carrying of property under special authorization, particularly designating the type of property to be carried, time of year in which it can be carried, and the places to which it can be carried; whereas charter operations pertain to sightseeing and tourist accommodations generally. Appellant contends that under and by virtue of the above provisions that Congress in its attempt to regulate and harmonize interstate transportation of passengers by motor vehicle made it mandatory that the operator, *once qualified,* must, if he did not desire special or charter rights, confine himself to certain routes or certain termini operations, and then authorized the Commission to inquire into, and to designate the route of termini operations, and to specify the particular service to be rendered.

The appellee having operated principally over U. S. Highway 99, and most certain within the territory adjacent thereto, was within his rights to designate the route over which he sought termini rights, in view of the apparent mandatory provision

of the Act, and asked the Commission, by virtue thereof to authorize such operation and specify the service to be rendered.

It was obviously the intent of Congress to "preserve, protect and coordinate" the interstate transportation system of the nation, and it devised, in order to consummate this result, provisos in the Act, requiring operators to regularize their services in order that regulation may be more efficient. And in this respect the appellee did only that which he contends the Act required him to do. He assumed a certain route within the territory which he had previously served, and is willing to confine himself within this restricted limit, as the Commission may so specify. He is, in fact, asking for something less than he had. Is it not in harmony with the intent of Congress that the Commission could better "keep its finger" on a regular scheduled operation, rather than a varied "anywhere-for-hire" irregular operation, such as was conducted by the appellee prior to the enactment of the Motor Carrier Act?

EFFECT OF COMMISSION'S ORDER

The effect of the Commission's ruling, *in refusing to qualify* appellee, as a common carrier of passengers, and in *refusing to regulate* the appellee within the contemplation of the Motor Carrier Act; in other words, the Commission's apparent action in *regulating an operator's qualification* has been an unjust and arbitrary interpretation of the law

to the extent of taking appellee's property without due process. Under Article I, Section 8, of the Constitution of the United States, Congress shall have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes". It is under and by virtue of this Constitutional provision that Congress has taken upon itself the power to regulate interstate commerce by motor vehicle. When Congress once assumes authority under this Constitutional provision, it must do so with reasonableness. The regulation of commerce has been held to be, in substance:

> "It means the power to control, foster and to protect commerce, to prevent its interruption and cessation, and to enact appropriate legislation, for the fulfillment of these purposes." Wilson vs. New, 37 Sup. Ct. R. 298.

And further,

> "It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guaranties of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen." Interstate Commerce Commission vs. Brimson, 154 U.S. 447, p.479.

In other words, all legislation for the regulation of interstate commerce has been and must be of a nature to control, foster and to protect such commerce in such manner as to not destroy or impair personal rights of our free citizens.

DENIAL OF DUE PROCESS

Has the action of the Commission in the instant case denied the appellee his guaranties of protection and his property rights under the Constitution? We say it has, and quote:

> "We have to consider whether the right is so fundamental in due process, that a refusal of the right is a denial of due process." Twining vs. State of New Jersey, 211 U.S. 78, pg. 107.

In this respect, it is asserted that the plaintiff's most fundamental rights have been destroyed. By the order of the Commission he has lost his franchise; he has lost the right to use his personal property—his busses, in gainful occupation; he has lost his right to gain a livelihood in the one and only means that he is now capable of conducting. In other words, before passage of the Motor Carrier Act, the appellee was using the implements of his trade in a gainful occupation — now all has been taken from him through the intervention of the Commission's order.

And further:

> "The protection of private property in the Fifth Amendment, presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Penn. Coal Co. vs. Mahon, 260 U.S. 393, pg. 415.

In view of this authority, and the situation in which appellee finds himself, can it be said that his property has been taken for public use? No. Can it be said that he has received any compensation? No. In other words, *not only has the appellee had taken from him his franchise, the implements of his trade, and the right to conduct a gainful occupation,* but the same has been taken from him *not for a public use, and not for compensation, but his private property has been taken and the effect of the taking has been such as to create a monopoly in favor of private enterprise in the use of a public owned highway.*

CONCLUSION

In conclusion, it is the appellee's contention that the Commission has so arbitrarily interpreted the Motor Carrier Act as to amount to a deprivation of the free rights of the appellee. Based upon the evidence before this court, the interpretation of the Motor Carrier Act warrants a different conclusion as a matter of law, than that arrived at by the Commission. We contend that the obvious intent of the Congress, in passing the act, was to preserve, and to protect the inherent liberties of the citizens of this nation, subject to reasonable regulation, and contend, in this respect, that *where a law may be susceptible to two different interpretations, that*

that interpretation most favorable to the citiz
of the nation not only should be adopted, *but m*
be adopted, and as said in United States vs. Hud
& Delaware, 213 U.S. 366, 408, and quoted in
Abbey Dodge, 223 U.S. 166, pg. 175.

> "Where a Federal statute regulating comme
> is reasonably susceptible of two interpretati
> * * * , one of which creates a repugnancy to
> Constitution, and the other avoids such rep
> nancy—the one which makes the statute h
> monize with the Constitution *must* be adopte
> (Italics ours.)

To this proposition, the Court below has s
stantially subscribed.

WHEREFORE, it is respectfully submitted t
the decree of the lower court should be affirmed.

WILLIAM L. HARRISON,
Attorney for Appellee.

W. LAIR THOMPSON,
EDWARD O. DOXEY,
Of Counsel.

APPENDIX

APPENDIX

The pertinent provisions of the Motor Carrier Act, 1935, c. 498, 49 Stat. 543 (U.S.C. Sup. I, Title 49, Chapter 8), read as follows:

Sec. 202* (a). It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States, and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

Sec. 203 (a). As used in this part—

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the

* The designation of the sections of the Act will follow the numeration found in the statute as enacted (Act of Aug. 9, 1935, c. 498, 49 Stat. 543, Sections 201-227), rather than the numeration adopted in the Code (U. S. C. Sup. I, Title 49, Secs. 301-327).

general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

Sec. 204 (a). It shall be the duty of the Commission—

(6) To administer, execute, and enforce all other provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

(c) The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rates, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

Sec. 206 (a). No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, that, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor

vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the juris-

diction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

Sec. 207 (a). Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Sec. 208 (a). Any certificate issued under sections 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

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No. 432

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

DAN E. MAHER, Doing Business As INTERSTATE BUSSES,
Appellee.

PETITION FOR LIMITED REHEARING

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

DAN E. MAHER, Doing Business As
INTERSTATE BUSSES,
Appellee.

To the Honorable Justice Felix Frankfurter:

Comes now Dan E. Maher, appellee, in the above entitled cause, and presents this, his petition, for a limited rehearing of the above entitled cause, and in support thereof respectfully shows:

I

The proviso of Section 206 of the Motor Carrier Act of 1935, creates an exemption as a matter of right in favor of an operator, which requires mandatory action by the Interstate Commerce Commission rather than an assumption of discretion when once the facts are proved, placing the operator within the exemption.

II

The Commission found that the appellee was engaged in an irregular passenger carrier operation be-

tween the States of Oregon and Washington, on June 1, 1935. This fact establishes, in the beginning, the appellee's exemption rights.

III

The words of the "Grandfather" clause, "has so operated since that time," can only refer to the period from June 1, 1935, until the effective date of the Act, namely, October 15, 1935. The findings of the Commission confirm the fact that appellee was operating an irregular operation between the States of Oregon and Washington between these dates, and on October 15, 1935.

IV

Appellee's rights, then, are determinative upon the character of his actual operation on June 1, 1935, and the continuance thereof until and on October 15, 1935.

V

The appellee filed a "Grandfather" clause application within the time limited by the Act, and performed every function necessary to entitle him to exemption under said proviso, and should be entitled to the continuation of such operation. *1

*1 Commissioner Lee, concurring in part with the Commission's findings and Order, said: "This applicant has been engaged in the Interstate transportation of passengers, as a carrier by motor vehicle since 1931. Under the "Grandfather" clause of the Motor Carrier Act of 1935, he is entitled to continue to operate. I agree with the majority that his regular route operation between Portland and Seattle does not come within the purview of the "Grandfather" clause. However, he did continue motor carrier operations begun long before the passage of the Act, and it is not right that he should be deprived of his right to operate in interstate commerce as he was doing when the Act was passed. By the "Grandfather" clause, it was sought to protect carriers in their existing operations. I would issue to him a certificate of convenience and necessity authorizing the continuance of the operation he was conducting when the Act was passed."

VI

Error in the form of application should not preclude the appellee when once the factual situation is proved, entitling him to exemption. *2

VII

The type of operation performed by the appellee after October 15, 1935, is not determinative of his exemption rights which were established prior to that date, because the Act gives the Commission authority to regulate, or penalize operators who do not conform to their certificate requirements and regulation.

VIII

The Commission has the power and authority to subject the appellee to penalties under the Act, when once it is determined that he is operating in contravention thereof.

IX

The effect of the judgment and decree of this court is to penalize and deprive the appellee, and cause a forfeiture of his established rights because of a mistaken concept of the law.

X

The appellee should be subject to penalty under

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*2 See Butcher Motor Carrier Application 1MCC485.
Bowles Common Carrier Application 1MCC589.
Jaax Common Carrier Application 1MCC597.
Michael Common Carrier Application 3MCC617.

the terms of the Act rather than to forfeiture of known rights, entitling him to exemption. The issuance of a certificate upon the facts is mandatory. The type of certificate issued is within the discretion of the Commission.

XI

The appellee should be entitled to the continuance of the irregular "anywhere-for-hire" operations conducted by him on June 1, 1935, to and including October 15, 1935, and the Commission authorized to determine the nature and extent of such operations. *3

Wherefore upon the foregoing grounds, it is respectfully urged that this petition for a limited rehearing be granted and that the judgment and decree of the District Court of the United States for the District of Oregon be upon further consideration affirmed as to the matters herein contained.

Respectfully submitted,
WILLIAM L. HARRISON,
Counsel for Dan E. Maher

CERTIFICATE OF COUNSEL

I, William L. Harrison, counsel for the above named appellee, petitioner herein, do certify that the foregoing petition for limited rehearing of this cause is presented in good faith and not for delay.

WILLIAM L. HARRISON

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*3 See Section 208 Motor Carrier Act of 1935.

PROOF OF SERVICE

County of Multnomah } ss
State of Oregon }

Service of the within petition for limited rehearing is hereby accepted in Portland, Multnomah County, Oregon this _____ day of May, 1939, by receiving a copy thereof duly certified to as such by William L. Harrison, counsel for Dan E. Maher.

_____
United States District Attorney for Oregon.

CERTIFICATION OF COPY

State of Oregon } ss
County of Multnomah }

I, William L. Harrison, Counsel for Dan E. Maher, appellee, hereby certify that the within petition for rehearing is a true and correct copy of the original and the whole thereof.

WILLIAM L. HARRISON,
Counsel for Dan E. Maher

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938

No. 432

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

DAN E. MAHER, Doing Business As
INTERSTATE BUSSES,
Appellee.

PETITION OF LLOYD C. WHITMAN, AMICUS CURIAE

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PETITION OF LLOYD C. WHITMAN AMICUS CURIAE

o the Honorable the Chief Justice
and Associate Justices of said Court:

Your petitioner, Lloyd C. Whitman, member of the
ar of this Court, represents clients interested in two
estions of law passed upon by this Honorable Court in
e above case, both of which questions are of great pub-
interest.

Your petitioner prays leave to make certain suggestions in the premises, *amicus curiae*, and herewith presents the same as suggestions and also as grounds for this petition; and suggests that the decision herein be modified accordingly.

I.

Section 206 (a) provides that application for a certificate may be made at any time within 120 days, and that "pending the determination of any such application the continuance of such operation shall be lawful," but that otherwise operation is unlawful without a certificate from the Commission.

Has this Honorable Court perhaps overlooked that to hold that the requirement of operation "since" June 1, 1935, requires operation after the effective date of the Act (October 15, 1935) is either to hold that the applicant must have *unlawfully* continued his operation *after* October 15, 1935, or to hold that the applicant must have filed his application *on* October 15, 1935, not, as Section 206 (a) provides, "within 120 days after this section shall take effect"?

The Statute forbids the operator to operate on and after October 15, 1935, *until* his application is filed. There is no provision requiring the applicant to resume the interrupted operation until he files his application.

It follows that the Statute speaks as of its effective date,—that "has so operated since" means has *on October 15, 1935*, so operated since June 1, 1935.

II.

As appears from the Court's opinion herein, appellee Maher has never anywhere claimed that the Commission should have taken any action other than to pass on Maher's claim of right under the "grandfather clause."

Upon the oral arguments in this Honorable Court appellee's counsel expressly disclaimed any such right. Whether the Commission should have taken such action in the instant case is therefore merely a moot question, and one upon which this Honorable Court has not had the services of interested counsel. Yet the Court's expression on the subject in the opinion herein is bound to embark the Commission and counsel for interested parties, for an indeterminable period of time, upon a sea of speculation as to what it may safely be assumed this Court will hold when the question is properly presented and argued.

Respectfully submitted,

LLOYD C. WHITMAN, *Amicus Curiae.*

STATE OF ILLINOIS }
COUNTY OF COOK } ss

Lloyd C. Whitman, affiant, on oath says that the facts alleged in the foregoing petition are true, and that on this 9th day of May, 1939, at Chicago, Illinois, affiant mailed, air-mail, copies of the foregoing petition to Mr. Wm. L. Harrison, 1206 Porter Building, Portland, Oregon, to the Attorney General of the United States, Washington, D. C. and to United States Interstate Commerce Commission, Washington, D. C.

LLOYD C. WHITMAN,
Affiant.

Subscribed and sworn to before
me this 9th day of May, 1939.

CATHERINE DEE,
Notary Public.

(NOTARIAL SEAL)

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SUPREME COURT OF THE UNITED STATES.

No. 432.—October Term, 1938.

The United States of America and Interstate Commerce Commission, Appellants, *vs.* Dan E. Maher, Doing Business as Interstate Busses.	Appeal from the District Court of the United States for the District of Oregon.

[April 17, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here on appeal, under Section 238 of the Judicial Code as amended (28 U. S. C. § 345), to review a final decree, setting aside an order of the Interstate Commerce Commission, granted by a district court of three judges under the Motor Carrier Act, 1935, (49 U. S. C. Supp. § 305(h)), in connection with the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. § 45, 47a).

The application to the special facts of this case of what is colloquially known as "the grandfather clause" of the Motor Carrier Act is the substantive question at issue. There is a preliminary jurisdictional problem touching those phases of the relations of the Interstate Commerce Commission to the courts which are implied by the claim that the Commission had issued a "negative order."

Section 206 of the Motor Carrier Act, Act of August 9, 1935, 49 Stat. 543, forbids common carriers by motor vehicle subject to its provisions from engaging in interstate operations without a certificate of public convenience and necessity to be issued by the Interstate Commerce Commission under Section 207 of the Act. "The grandfather clause" of section 206, however, provides that "if any such carrier . . . was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation".

On January 24, 1936, the appellee, Maher, filed an applicatio
under the "grandfather clause" for a certificate to engage in th
transportation of passengers and baggage over U. S. Highwa
No. 99 between Portland and Seattle and intermediate point
After a hearing was had before a "Joint Board" composed o
members from the states involved (§§ 203(a), (19) and 205) a
which competing carriers and the Public Utilities Commission o
Oregon appeared in opposition to the application, and after
report was filed by the Joint Board with the Interstate Com
merce Commission recommending that the application be denie
the Interstate Commerce Commission, Division 5, on October 2
1937, found the facts to be as follows: From 1931 until Ma
29, 1936, the appellee had engaged in *bona fide* "anywhere-fo
hire" operations in Oregon with occasional entries into Washin
ton. There were rare trips to Seattle, no service at all to most
the intervening points, and no showing that passengers were tran
ported on return trips to Portland. On May 29, 1936, the appell
began his regular-route service between Portland and Seattle whi
he conducted regularly since that time. But upon the institution
the regular-route service between Portland and Seattle the a
pellee discontinued the "anywhere-for-hire" operations theretofo
conducted. Upon this showing Division 5 found that the servi
conducted by the appellee since May 29, 1936, was a different ser
ice from that conducted by him prior to that time, and therefo
concluded that he did not come within "the grandfather clause
And so, the Commission denied Maher's application and order
him "to cease and desist" from "all operations" as a common c
rier in interstate commerce. Thereupon the appellee filed t
present suit in the District Court for the District of Oregon agai
the United States and the Interstate Commerce Commission, pr
ing that the Commission's order be set aside and "any constr
tion thereunder" enjoined. The suit was disposed of on the ple
ings, the answer of the Commission having incorporated its rep
and orders. A majority of the District Court entertained jur
diction and held that the appellee was entitled to an "anywhe
for-hire" permit under "the grandfather clause" as well as
regular-route permit under Section 207. 23 F. Supp. 810. C
cuit Judge Haney found jurisdiction to review the cease and des
order, although not the order denying the certificate of convenie
and necessity, but sustained the Commission's view of the A

The jurisdictional problem presents another instance of the Interstate Commerce Commission having been invested with power to free a complainant of restrictions placed upon his conduct by a statutory scheme and having definitively rejected the claim for dispensation. The applicant before the Commission then came into court to "set aside" and "annul" the "order" of the Interstate Commerce Commission, claiming that the Commission's action was based on a wrong reading of the authority which the Act of Congress gave it. To the hearing of such a claim there is no jurisdictional barrier, as we have held today in *Rochester Telephone Corp.* v. *United States, ante* page —.[1]

On the merits the case brings into question the validity of the construction placed by the Interstate Commerce Commission upon Section 206(a) of the Motor Carrier Act relieving carriers operating on June 1, 1935, under the circumstances defined by the terms of Section 206(a) from the requirements of Section 207.[2] The latter section requires a finding by the Commission that the granting of such a certificate is demanded by public convenience and

[1] For reasons on which its legislative history appears to shed no light, the phrase "negative order" crept into Section 205 of the Motor Carrier Act in a context not covering the present situation.

[2] Sec. 206.(a) No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having author-

necessity. But under Section 206(a) the Commission must is "such certific[illegible]e without requiring further proof that public c venience and necessity will be served" by an applicant who "was bona fide operation as a common carrier by motor vehicle on Ju 1, 1935, over the route or routes or within the territory for wh application was made and has so operated since that time". this legislation Congress responded to the felt need for regulat interstate motor transportation through familiar administrative vices, while at the same time it satisfied the dictates of fairness affording sanction for enterprises theretofore established. Whet an applicant seeking exemption had in fact been in operation wit the immunizing period of the statute was bound to raise cont verted matters of fact. Their determination Congress entrusted the Commission. The legal issues presented by this record are atively simple once the somewhat confused operations of the ap lee's business are clearly defined.

Invoking the "grandfather clause" the appellee sought from Commission a certificate authorizing continuance of his regular se ice between the fixed termini of Portland and Seattle on U. S. Hi way 99. But the Commission found that the regular operation o this route had only been instituted on May 29, 1936. Theretof and including the crucial period prior to June 1, 1935, the appe

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ity to grant or approve such certificates and if such carrier has obtained s certificate from such board. Such transportation shall, however, be other subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commiss be verified under oath, and shall be in such form and contain such informa and be accompanied by proof of service upon such interested parties as Commission shall, by regulation, require. Any person, not included within provisions of paragraph (a) of this section, who or which is engaged in tr portation in interstate or foreign commerce as a common carrier by m vehicle when this section takes effect may continue such operation for a pe of one hundred and twenty days thereafter without a certificate and, if ap cation for such certificate is made to the Commission within such period, carrier may, under such regulations as the Commission shall prescribe, conti such operation until otherwise ordered by the Commission.

Sec. 207.(a) Subject to section 210, a certificate shall be issued to qualified applicant therefor, authorizing the whole or any part of the op tions covered by the application, if it is found that the applicant is fit, will and able properly to perform the service proposed and to conform to the visions of this part and the requirements, rules, and regulations of the C mission thereunder, and that the proposed service, to the extent to be aut ized by the certificate, is or will be required by the present or future pu convenience and necessity; otherwise such application shall be denied: *vided, however,* That no such certificate shall be issued to any common car of passengers by motor vehicle for operations over other than a regular r or routes, and between fixed termini, except as such carriers may be authori to engage in special or charter operations.

had been engaged in quite different services from those for which it asked a certificate, namely, "an irregular, so-called anywhere-for-hire operation in Oregon with occasional trips to points in Washington" over any route adapted to a particular trip, but using at least for part of the distance U. S. Highway 99 on trips to Washington. These irregular operations were discontinued after the appellee's regular route was established. Applying these findings which are binding here, the Commission ruled that the appellee did not bring himself within the privilege of the "grandfather clause." In making this application of the statute, the Commission properly construed it.

The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the "route or routes" for which an application under the "grandfather clause" is made as against operations "within the territory", Congress plainly adopted the familiar distinction between "anywhere-for-hire" bus operations over irregular routes and regular route bus operations between fixed termini.[3] Such recognition is implicit also in the provision of Section 208(a) that "Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular "anywhere-for-hire" service was not "so operated", as required by Section 206, when the Commission passed upon the application for a "grandfather" certificate, the Commission rightly rejected the application.

But the District Court set aside the Commission's order on another ground. It held that when the Commission rejected appellee's claim under the "grandfather clause" another provision of Section 206(a) sprang into relevance, to wit "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such

[3] See *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685, 699; *Coordination of Motor Transportation*, 182 I. C. C. 263, 274. See also *Coordination of Motor Transportation*, Sen. Doc. No. 43, 72d Cong., 1st Sess., pp. 34-35; *Regulation of Transportation Agencies*, Sen. Doc. No. 152, 73d Cong., 2d Sess., pp. 176, 191-192.

certificate shall be issued or denied accordingly." We do not read the statute as laying a compulsion upon the Commission to canvass all the questions of public and private interest that are implicit in an application for a certificate based on "public convenience and necessity" when the applicant himself only seeks the favor of the "grandfather clause" and makes no claim, either before the Commission or in his bill seeking to enjoin its action, to have the Commission act outside the "grandfather clause".

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.